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Supreme Court of the United States

CITY OF SAN DIEGO;
MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,
Petitioners,

v.

PHILIP K. PAULSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court is bound to follow the decisions of the state supreme court when ruling exclusively on an issue of state constitutional law.

2. Whether the decision of the Ninth Circuit requires the City of San Diego, in an open bid, as-is sale of its public property with a Latin cross, to engage in unlawful, content-based viewpoint discrimination against bidders who intend to preserve the cross and in favor of bidders who intend to remove it, in violation of the First and Fourteenth Amendments of the United States Constitution.

3. Does an open bid, as-is, fair market value sale of public land with a Latin cross to the highest bidder violate the federal Establishment Clause and/or Article XVI, section 5 of the California Constitution where the successful bidder has discretion to maintain or remove the cross and there is no condition or restriction on the property except that it simply be used as a war memorial?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of San Diego ("City") respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit published at 294 F.3d 1124 (9th Cir., June 26, 2002), is reprinted and attached as Appendix "A." The three-judge panel opinion of the Ninth Circuit is fully adopted and incorporated in its entirety in the dissent of the en banc opinion and is thus not separately attached. The district court's order denying as moot Respondent's motion to enforce the injunction forbidding the presence of the Mt. Soledad cross on public property is reprinted and attached as Appendix "B." A previous order by the district court determining the original sale by the City to be unconstitutional is reprinted and attached as Appendix "C."

STATEMENT OF JURISDICTION

The Opinion sought to be reviewed is the Opinion of the United States Court of Appeal for the Ninth Circuit, published at 294 F.3d 1124 (9th Cir., June 26, 2002).

An extension of time was granted by the United States Court of Appeals for the Ninth Circuit for the City to file its Petition for Rehearing by July 31, 2002. A timely Petition for Rehearing was filed on July 31, 2002. Rehearing was denied on October 22, 2002, by Order which is reprinted and attached as Appendix "D." The jurisdiction of this Court to review a judgment of a United States Court of Appeals is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

(1) The First Amendment to the United States Constitution.
(2) The Fourteenth Amendment to the United States Constitution.
(3) Article XVI, Section 5, of the California Constitution.

The foregoing provisions are reprinted and attached as Appendix (App.) "G."

STATEMENT OF THE CASE

In 1991, the district court ruled that the permanent presence of a Latin cross[1] on City park property was a violation of Article, I, section 4 of the California Constitution (No Preference Clause).[2] The City's initial attempt to comply with this ruling by a negotiated sale to the Mt. Soledad Memorial Association (Association) in the amount of $14,500 for approximately 222 square feet of land immediately beneath the cross was held by the district court in 1997 to be constitutionally infirm due to the method of sale and the amount of land sold. App. 63a-68a.

In response, the City arranged to sell a larger parcel of property (approximately one-half acre or 22,172 square feet), by a well-publicized request for proposals, rather than

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[1] The cross in its previous form was originally erected in 1913. In its current form, the cross was erected by the Association in 1954. Both the current cross and the Mt. Soledad Natural Park are designated local historical sites. App.2a-3a, 23a, 93a; *Ellis v. City of La Mesa*, 990 F.2d. 1518, 1521 (9th Cir. 1993).

[2] *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D.Cal.1991); affirmed by *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

through a negotiated sale. App. 25a. This second sale was, at Respondent's suggestion, modeled after the process used by the City of San Francisco to settle an essentially identical case involving a challenge to a Latin cross in a public park. As part of the sale, the Association was to quitclaim its property interests (including the cross) in the Mt. Soledad Natural Park to the successful bidder in exchange for a refund of the $14,500 it paid in the first sale. App. 5a.

The second sale was accomplished following well-established, written City guidelines. App. 43a-45a, 61a-63a. There were no irregularities in the process. There was nothing in the request for proposals suggesting a preference for religion. App. 43a-45a. In fact, the request for proposals along with the extensive publicity which preceded it, declared the City was neither requiring nor precluding the retention of a cross in evaluating purchase proposals. App. 5a-6a, 43a-45a. The sale was open to all non-profit organizations and did not require that the cross be maintained. App. 43a-45a. It required only that the property be used for war memorial purposes, a restriction imposed by the voters on any City sale of a portion of the Mt. Soledad Natural Park. App. 3a-4a. Prior to the bidding and unbeknownst to the bidders, the City had computed the minimum acceptable bid to be $35,000. App. 7a. At the end of the process, the City Council, upon recommendation of the bid review committee, awarded the property to the highest bidder for $106,000. App. 7a-8a.

Nevertheless, Respondent challenged this second sale on the same grounds as he had challenged the earlier one. However, this time the district court found "the amount of land sold, along with the proposed improvements, divests the City of any appearance of preference of religion . . ." App. 48a. In addition, the district court found "the method of sale, through this open and apparently neutral bidding process, did not favor the Mt.

Soledad Association and did not violate the California Constitution's prohibition against the preference of religion." App. 45a.

Therefore, Respondent's motion to enforce the injunction was denied by the district court as moot. Respondent appealed. On August 22, 2001, the Ninth Circuit Panel issued a unanimous decision (3-0) upholding the constitutionality of the sale and affirming the district court's denial of the injunction as moot. App. 22a-37a.

On September 25, 2001, Respondent petitioned for rehearing en banc on the sole grounds that the public sale violated the state No Preference Clause and the federal Establishment Clause. App. 72a-87a. On February 7, 2002, the Ninth Circuit granted rehearing en banc. On March 1, 2002, the en banc panel ordered supplemental briefing only on the issue of whether the existence of the cross violated the state No Preference Clause or the federal Establishment Clause. App. 71a. This order by the en banc panel is reprinted and attached as Appendix "E."

On March 21, 2002, the en banc panel heard oral argument. No question, however, was raised with regard to the issue of Article XVI, Section 5 of the California Constitution (No Aid Clause). On June 26, 2002, without any briefing or argument on the No Aid Clause, the en banc panel, in a 7-4 ruling, relied exclusively on the No Aid Clause and hypothesized facts to conclude that the sale was unconstitutional.[3] App. 1a-19a. In doing so, the Panel declined to rule on the No Preference and federal Establishment Clause issues which were specifically briefed and argued, and relegated them to a footnote. App. 18a. To

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[3] Significantly, the en banc majority found that "[n]one of the district court's findings of historical fact is clearly erroneous." App. 9a.

date, fourteen Court of Appeals judges have had the opportunity to review the constitutionality of this public sale and the tally so far is an even split (7-7) on this issue.[4]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS CRITICALLY IMPORTANT ISSUES REGARDING THE SEPARATION OF CHURCH AND STATE WHICH WERE WRONGLY DECIDED BY AN EN BANC MAJORITY OF THE NINTH CIRCUIT

The fair market value transaction in this case was scrupulously neutral because it was an as-is, open bid sale of public land to the highest bidder. The successful bidder could maintain or remove the cross fixture existing on the property. Nevertheless, the Ninth Circuit, using the California state No Aid Clause as its exclusive basis, deemed the sale unconstitutional simply because the cross was conveyed with the sale of the land and the property was restricted to war memorial purposes-- a restriction, ironically, that the Ninth Circuit admitted served "an undeniably appropriate secular purpose." App. 15a.

This decision is a clear departure from any previous state or federal decision on the subject and constitutes an unprecedented expansion of state constitutional rights in matters of religious freedom to the point where it tramples upon the constitutionally-protected free speech, free exercise, and equal protection rights of the Association and its donors. In particular, it erodes the ability of anyone wishing to obtain public property of or with religious significance at fair market value by requiring that the

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[4] Three judges on the Ninth Circuit panel unanimously ruled (3-0) that the public sale was constitutional. After en banc review, the court in a 7-4 decision, ruled that the same public sale was unconstitutional.

government somehow penalize only purchasers intending to maintain, as opposed to destroy, the property in a tortured attempt to equalize economic burdens not constitutionally required in any other context.

The impact of this decision is not merely limited to this case,[5] but in fact sets a precedent that threatens the future of our nation's historic structures and relics. The Ninth Circuit's decision prevents government from divesting objects and structures of obvious historical value in an attempt to preserve them-- even to private non-profit historical organizations with the available resources-- simply because such properties may also have some religious significance. [6]

The Ninth Circuit's ruling is particularly troubling not only for its substantive misapplication of the No Aid Clause, but also for its procedural abuse of discretion. It not only ignored the properly briefed and argued federal constitutional question before it, and used a state constitutional provision as its exclusive basis, but in doing so, it failed to properly adhere to state court decisions on the

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[5] The implications of the case at bar are also germane to the resolution of the issues in *Kong v. City and County of San Francisco*, 18 Fed. Appx. 616 (9th Cir. 2001), which involves a similar challenge by atheists to the as-is, open sale of public property containing a cross fixture on Mt. Davidson.

[6] There are undoubtedly numerous such properties throughout the nation. In California alone, there are four restored Spanish missions in the state park system: La Purisima Mission State Historic Park (SHP), San Juan Bautista SHP, Santa Cruz Mission SHP, and Mission San Francisco Solano de Sonoma. *See* California State Parks website at http://www.parks.ca.gov. There are also almost 100 properties with religious themes that are owned and maintained by California or one of its municipalities, including Oroville Chinese Temple, St. Peters Memorial Church, Old Adobe Chapel, Temple Beth Israel, Hongwanghi Buddhist Temple, and Yosemite Chapel, to name but a few.

matter. By cavalierly inventing new state law, the Ninth Circuit has strongly encouraged forum shopping by affording relief which the state court, if given the opportunity to adjudicate, would otherwise not provide.

In reversing the "excellent opinion"[7] of the three-judge panel authored by Senior Judge Proctor Hug, Jr., the en banc majority relied exclusively on the No Aid Clause, an obscure provision of the California Constitution which prohibits governmental aid for any sectarian purpose unless such aid is indirect, remote, and insubstantial. Heretofore, no court– federal or state– has ever *exclusively* relied upon this state constitutional provision as grounds for determining governmental action to be unconstitutional. In *every* opinion involving the No Aid Clause, analysis was primarily based on other state and/or federal constitutional provisions. Analysis was only secondarily conducted, if at all, under the No Aid Clause, but only after the unconstitutionality of the governmental action was already decided under another provision. Therefore, the No Aid Clause has *never* been ascribed any independent significance by any court until now.

In light of the No Aid Clause's shadowy past[8], the curious fact that it has never been an independent basis for striking down governmental action with religious implications should come as no surprise. Although on its face the No Aid Clause purports to generally prevent governmental aid to religion, in reality it was based on the

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[7] *Paulson v. City of San Diego*, 294 F.3d 1124, 1134 (9th Cir. 2002) (*Fernandez, F., dissenting*).

[8] The significance of history in constitutional interpretation was recently underscored by the California Supreme Court. *Sands v. Morongo Unified School District*, 53 Cal.3d 863 at 886 (Lucas, C.J., concurring).

1875 Blaine Amendment[9] which was borne of anti-Catholic animus. Legal commentators have astutely pointed out that its main purpose was to keep public educational funds in the hands of the Protestant-dominated public schools and out of the hands of Roman Catholic parochial schools. 27 Ariz. St. L.J. 1085, 1147 (1995). Indeed, the United States Supreme Court has recently denounced the Blaine Amendment and its progeny as a "shameful pedigree that we do not hesitate to disavow." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J., plurality opinion).

Significantly, California case law and authority clearly establishes that a fair market value transaction, especially a sale to the highest bidder, is not aid. Even if it was, aid to a secular organization has never been deemed unconstitutional under the No Aid Clause.

Furthermore, the en banc majority based its decision on an incorrect reading of the state religion clauses as being more protective of the principle of church-state separation than the First Amendment of the United States Constitution.[10] Although there has been some discussion by

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[9] The No Aid Clause has been specifically referenced as a Blaine Amendment. 12 Geo.Mason U. Civ. Rts. L.J. 159, 192, fn 125 (2002); *see also* http://www.blaine-amendment.com/states/states_files/CA.html. The text of the original 1875 Blaine Amendment is substantively similar to the current No Aid Clause. It reads in relevant part as follows: "[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations." 4 Cong. Rec., 44th Cong., 1st Sess. 205 (1875); 21 Harv. J.L.& Pub. Pol'y 657, fn 64 (1998).

[10] The en banc majority did this without explicitly stating as much. However, because the three-judge panel's decision used the federal establishment clause in evaluating the City's sale, the en banc majority's decision overruling the panel on state grounds implicitly

the California courts in *dicta* concerning the allegedly more restrictive nature of the California state constitution, the State High Court has most recently endorsed the view that the state religion clauses are no more protective than the federal Constitution.[11] In contrast to the three-judge panel, the en banc majority disregarded *East Bay Asian*.

In doing so, the en banc majority not only failed to properly interpret the No Aid Clause, but in expanding its scope beyond that which the California Supreme Court has heretofore permitted, the en banc majority's interpretation conflicts with the protections afforded by the First and Fourteenth Amendments of the United States Constitution.

A. THE NINTH CIRCUIT MUST FOLLOW THE DECISIONS OF THE STATE COURT WHEN RULING ON A STATE CONSTITUTIONAL PROVISION

The en banc majority in this case relied exclusively on the No Aid Clause, a state constitutional provision, as its sole basis for striking down the City's fair market value sale of public land to a non-sectarian, non-profit organization. The en banc majority did so despite the fact that an examination of the California courts analyzing the No Aid Clause results in the following conclusions: (1) the No Aid Clause has never been used as an exclusive basis for deeming governmental action unconstitutional; (2) the No Aid Clause does not constitutionally forbid "governmental aid" to a secular organization; and, (3) the No Aid Clause does not consider a fair market value transaction to be aid.

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adopts this primacy view of the California Constitution.

[11] *East Bay Asian Local Development Corporation v. State of California*, 24 Cal.4th 693, 719 (2000).

By failing to adhere to state court decisions on the application of the No Aid Clause, the Ninth Circuit contravened a fundamental principle of jurisprudence. When interpreting state law, federal courts are bound to follow the decisions of the state's highest court. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Although the Ninth Circuit paid lip-service to this principle, a closer examination of the en banc decision clearly reveals that it evasively avoided any substantive analysis of *East Bay Asian*, the most recent articulation of the California Supreme Court on the No Aid Clause. Had it done so and had it *scrupulously* analyzed a number of other state appellate court decisions and state Attorney General opinions applying the No Aid Clause, the Ninth Court would have found that California case law and authority have concluded that a fair market value transaction to the highest bidder cannot be considered aid. *See section I(d), infra.*

The foregoing principle of jurisprudence is so firmly rooted in our system of federalism that neither the United States Supreme Court nor any other federal tribunal has any authority to place construction on a state provision different from the one rendered by the state's highest court. *Johnson v. Fankell*, 520 U.S. 911, 917 (1997). Even when the state supreme court has not spoken on a particular state issue, federal courts are not free to invent state law. Rather, federal courts must determine what result the court would reach based on state appellate court opinions, statutes, and treatises. *Hewitt*, 940 F.2d at 1565. To allow otherwise would be a return to an antiquated and outlawed judicial system wherein the federal judiciary has the power to create federal general common law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

There are two religion clauses in the California Constitution which have no direct counterpart in the federal Constitution; these are Article I, section 4 (No Preference

Clause) and Article XVI, section 5 (No Aid Clause). Although the religion clauses of the California Constitution have been described as "the definitive statement of government impartiality in the field of religion," they have never been definitively construed by the California Supreme Court to afford greater protections than those guaranteed under the federal Establishment Clause. *East Bay Asian*, 24 Cal. 4th at 719 (2000); *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 604 (1974). In fact, it is arguable that the No Aid Clause with its proscription against "direct, immediate, and substantial" governmental aid for religious purposes is subsumed under the *Lemon* test used to evaluate federal Establishment Clause violations.[12] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Agostini v. Felton*, 521 U.S. 203, 220 (1997) (under Establishment Clause analysis, aid that was indirect, remote, or incidental is constitutional).

The Ninth Circuit's unprecedented misapplication of the No Aid Clause is compounded by the fact that the issue was not briefed or argued by the parties before the en banc

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[12] In its discussion of the federal Establishment Clause, the California Supreme Court stated that "a law which confers indirect, remote, or incidental benefits upon religious institutions is not, for that reason alone, constitutionally defective." *California Educ. Facilities Auth.*, 12 Cal.3d 593, 600, *citing Committee for Public Education & Religious Liberty v. Nyquist*. 413 U.S. 756, 771-772 (1973). In fact, the California Attorney General has explicitly recognized that "[i]n many of the California cases dealing with the 'no aid' clause of the State Constitution, the courts have found the federal Establishment Clause decisions persuasive." 45 Ca.Atty.Gen.Ops 89, 92, fn 2 (1965). In discussing the application of the No Aid Clause, the California Attorney General referred to the federal Establishment Clause and stated that "both tests may be no more than parts of a single underlying principle–a principle rooted in the sometimes neglected truism that 'State power is no more to be used so as to handicap religions, than it is to favor them.'" 25 Ca.Atty.Gen.Ops. 309, 313 (1955), citing *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

panel.[13] App. 71a-87a. In fact, the No Aid Clause was never even raised by Respondent at the rehearing. App. 72a-87a. In its haste to strike down the City's sale as unconstitutional as well as to avoid ruling on the federal Establishment Clause issue, the en banc panel contravened its own internal procedural guidelines[14] by failing to request briefing and argument on an issue it determined to be case-dispositive. It then usurped the function of the state courts in a transparent attempt to insulate its decision from further review by not only ruling exclusively on the basis of an unbriefed and unargued state constitutional provision, but ascribing its own independent interpretation to it.

The need to be vigilant to such federal judicial overreaching on state constitutional matters is required because our system of federalism provides plenary power to the state to enact and interpret its own independent constitutional and statutory law, subject only to the qualification that such law may not restrict the guarantees under the federal Constitution. *Raven v. Deukmejian*, 52 Cal. 3d 336, 354 (1990). In this case, however, as well as in a number of other recent instances[15], the Ninth Circuit has

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[13] In his Petition for En Banc Rehearing reprinted and attached as Appendix "F", Respondent only raised the issue that the City's sale was unconstitutional in violation of the No Preference Clause and the federal Establishment Clause. App. 72a-87a. The en banc panel ordered supplemental briefing only on the issue of whether the existence of the cross violated the No Preference Clause or the federal Establishment Clause. App. 71a. Therefore, no mention of the No Aid Clause was made at the rehearing.

[14] General Order 4.2 of the Ninth Circuit dictates that the court give serious consideration to allowing parties to brief and argue an issue where the Court intends to use that issue as the basis for its ruling.

[15] On Monday, November 4, 2002, the United States Supreme Court voted unanimously to summarily reverse the Ninth Circuit in three separate cases. *Woodford v. Visciotti*, 123 S. Ct. 357 (2002); *Immigration and*

repeatedly overstepped the limits of its power. The Ninth Circuit has been particularly unreceptive to any symbol or act even remotely suggestive of public support for religion regardless of the context.[16] Federal courts simply cannot be given free reign to exercise broad discretion in matters pertaining to state constitutional issues– to sit and act as state supreme courts, reviewing interpretations of state law de novo, and as in this case, substantively applying only those cases, or aspects of those cases, which support a conclusion that the Ninth Circuit unilaterally and pre-determinedly wished to reach.

Such a result runs counter to the mandate that the California Supreme Court, not the Ninth Circuit, is the final arbiter of California state constitutional questions and is entrusted with the role of interpreting such provisions in light of their unique language, purposes, and history. *Sands*, 53 Cal. 3d 863, 903 (1991); *Raven v. Deukmejian*, 52 Cal. 3d 336, 354 (1990). Former California Supreme Court Justice Mosk stated, "[A]s the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. State courts are, and should be, the first line of defense for individual liberties in a federal system." *Sands*, 53 Cal. 3d 863 at 906 (Mosk, J., concurring).

Naturalization Service v. Ventura, 123 S. Ct. 353 (2002); *Early v. Packer*, 123 S. Ct. 362 (2002).

[16] In fact, on the very same day as the en banc's decision here, the Ninth Circuit struck down the United States of America pledge of allegiance because it celebrates "one Nation under God." *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). In a case later remanded by the United States Supreme Court, an en banc majority of the Ninth Circuit held unconstitutional governmental benefits to a private organization that were equally available to all such groups on the basis of that organization's religious viewpoint. *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir. 2001).

Where federal courts opt to rule exclusively on state rather than federal constitutional grounds, they must carefully adhere to state court decisions on the matter. The danger of not doing so is obvious. If the federal court errs, it applies law other than state law. *See Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1080 (Ohio 1991). In a such a case, the misinterpretation not only leads to immediate injustice to one or more of the parties, but also misleads and injures "other potential litigants [as they] are likely to behave as if the federal decision were the law of the state." *Id.*

Furthermore, this injustice is compounded by the fact that forum shopping is encouraged because plaintiffs, aware of the liberal interpretation of state constitutional provisions by the Ninth Circuit, will undoubtedly opt for the federal forum which provides them with a basis for relief that they might not otherwise possess in state court. This miscarriage of justice by the federal court is propelled by its own precedential weight because plaintiffs opting for the federal forum will never give state courts the opportunity to properly interpret their own state provisions.

B. THE APPLICATION OF THE NO AID CLAUSE BY THE NINTH CIRCUIT VIOLATES THE FIRST AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

It is no coincidence that the Ninth Circuit has unilaterally chosen to make the same state constitutional provision –the No Aid Clause– that arose out of a nativist anti-Catholic sentiment prevalent in the late 1800's the centerpiece of this litigation. It is particularly telling that on the same day that the Ninth Circuit struck down our nation's Pledge of Allegiance as being unconstitutional, it determined in this case that the award of public land containing a cross fixture to the highest bidder in an as-is,

open bid sale was likewise unconstitutional. *Paulson*, 294 F.3d 1124 (9th Cir. 2002).

It also is not surprising that the en banc majority evasively avoided discussion of any particular remedy because the practical consequence of the Ninth Circuit's interpretation of the No Aid Clause is an unworkable solution. The Ninth Circuit effectively requires either overt government hostility towards religion by requiring destruction of the cross or impermissible content-based discrimination in the form of adverse treatment of bidders with differing religious viewpoints.

The en banc majority rejected the City's sale because it allegedly unfairly required a high bidder who wished to construct a secular memorial on the property to be saddled with the costs of removing the cross and of constructing an alternative memorial, as opposed to those bidders who intended to allow the cross to remain on the property. *Paulson*, 294 F.3d 1124 at 1132. Implicit in the Ninth Circuit's holding is that the cross must be removed or destroyed prior to any sale or that a new sale must be structured so as to provide a financial subsidy only to those bidders who want the cross destroyed.[17]

Stated differently, the Ninth Circuit's interpretation of the No Aid Clause forces the City to engage in impermissible content-based discrimination because a bidder wishing to preserve the cross must be penalized on

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[17] No court has ever required a cross to be destroyed. To the contrary, courts have repeatedly stated that symbolic religious fixtures need not be destroyed because a sale of the underlying property is permissible. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528, fn 7 (9th Cir. 1993) (Beezer, J., specially concurring); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996).

the basis of his or her viewpoint.[18] Such a mandate violates the federal Establishment and Free Exercise Clauses and amounts to a violation of Equal Protection under the Fourteenth Amendment as well as impermissible viewpoint discrimination under the First Amendment.

5. *The Ninth Circuit's Application of the No Aid Clause Violates The Establishment Clause*

The second prong of the tripartite *Lemon* test used to analyze the constitutionality of governmental conduct with religious implications requires that a "governmental program neither advance *nor inhibit religion*." *Lemon*, 403 U.S. 602, 612-613 (Emphasis added). A violation of this mandate is a violation of the Establishment Clause. *Id.*

In this case, the en banc majority reasoned that anything that aids in preserving the cross also aids a religious purpose. The obvious logical corollary is that anything which inhibits the cross' preservation inhibits a religious purpose. The Ninth Circuit's interpretation of the No Aid Clause essentially requires the City to destroy the cross or subsidize only those who would destroy the cross with sufficient funds for both cross destruction and construction of a secular memorial. The Ninth Circuit's skewed interpretation of the No Aid Clause itself confers

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[18] The ACLU's proposals simply underscore the problematic basis for the en banc majority's decision. In prior briefing before the Ninth Circuit, the ACLU suggested that the constitutional infirmity could be cured if the City were to offer to remove the cross at the high bidder's request. However, this would be a financial subsidy to only those who wished to remove the cross. Alternatively, the ACLU suggested that the City could provide a set amount of financial aid to all bidders. However, such a proposal fails to address the concerns raised by the Ninth Circuit as it does not improve the financial position of those bidders wishing to remove the cross relative to those bidders wishing to maintain it.

aid on the non-religious, thus discriminating against religion and violating the Establishment Clause.

2. *The Ninth Circuit's Application of the No Aid Clause Violates The Free Speech Rights of Bidders Wishing to Preserve The Cross And The Many Families That Have Purchased Memorial Plaques*

When the government has made property or some other type of benefit available to advance a secular purpose, the Court has repeatedly prohibited the government from discriminating on the basis of religious viewpoint. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

In this case, the City made available for sale a portion of public land atop Mt. Soledad for the undeniably secular purposes of having a war memorial on the property and to ensure compliance with the state and federal constitutions. *See Paulson*, 294 F.3d 1124 at 1132; *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1014 (9th Cir. 1986). Having opened up such a benefit, the City cannot discriminate in the sale on the basis of religious viewpoint by, for example, offering a subsidy to only those wishing to see the cross destroyed. Any suggestion, therefore, that the cross be destroyed prior to the sale of the property or that financial aid be given to only those bidders wishing to see the cross destroyed amounts to impermissible religious viewpoint discrimination. Even if the governmental aid is seen as the

cross itself, the cross was to be neutrally conveyed to any bid winner irrespective of religious viewpoint.[19]

Moreover, in striking down the sale, the en banc majority altogether ignored the free speech rights possessed by the Association and the Mt. Soledad plaque holders. The cross along with the wall of granite plaques *together* constitute the memorial for which the plaque holders donated substantial sums of money to express and honor the significant contributions of our nation's veterans. By requiring the removal of the cross or penalizing those who seek its preservation, the Ninth Circuit created an incentive to destroy a large part of the memorial itself and violated the vested rights of hundreds of plaque holders who invested substantial money on the memorial in reasonable reliance upon the original sale and who view the cross as an integral component of their message. Whether secular or religious in nature, private speech is fully protected under the First Amendment. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995). Like the cross itself, the memorial plaques that are displayed along with the cross represent protected free speech and are symbolic expressions entitled to First Amendment protections. *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

3. *The Ninth Circuit's Application of the No Aid Clause Violates The Free Exercise Clause*

While an individual state may have an interest in achieving greater separation of church and state than is ensured under the federal Establishment Clause, any such interest is necessarily limited by the Free Exercise Clause.

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[19] The cross has value even to an atheist group because it could be sold for a profit or its public destruction could be symbolically used to further an anti-religious message.

Widmar v. Vincent, 454 U.S. 263, 276 (1981). Under the Free Exercise Clause, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).[20] Avoidance of a state constitutional violation has never been held by this Court to be a compelling state interest nor would the Supremacy Clause allow states to enact restrictions that violate the federal Constitution.[21] Moreover, government may not impose special disabilities on the basis of religious views or religious status. *See McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

In the case at bar, two Christian-based religious organizations submitted bids to purchase the land containing the cross.[22] To penalize or prevent a private organization who wishes to espouse Christian viewpoints from doing so by requiring the destruction of the cross prior to its sale or the payment of a financial subsidy to only those desiring the cross' destruction adversely impacts the religious beliefs and practices of these Christian believers interested in purchasing the property. It imposes a special

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[20] Although the *Sherbert* test has been criticized and held inapplicable where neutral, generally applicable laws are concerned, here, any requirement as part of the sale that the cross be destroyed or that those seeking its preservation must be penalized is not a neutral, generally applicable condition. *See Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990).

[21] There is no compelling state interest because there is neither a violation of the No Aid Clause nor the Establishment Clause in this case. *See* paragraph C, *infra*.

[22] The Association is not one of these two groups. Although the Association does not have a religious mission, it nonetheless has Free Exercise rights protected by the First Amendment if it wishes to espouse a religious viewpoint or engage in religious practices. *See Paulson*, 294 F.3d 1124 at 1143 (Fernandez, J., dissenting).

disability on them that non-Christian groups do not have to bear. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993). Had the fixture on the property been something other than an object with religious significance, there would be absolutely no need to discuss the impact of its conveyance in an otherwise neutral sale.

4. *The Ninth Circuit's Application of the No Aid Clause Violates Equal Protection*

In order to pass muster under the Equal Protection Clause of the Fourteenth Amendment, at a minimum, any state action that treats some people in a discriminatory manner must bear a rational relationship to a legitimate state interest. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Where state action differentiates based upon a suspect criterion, however, it is subject to the highest standard of review– strict scrutiny–and must be narrowly tailored to address a compelling state interest to avoid invalidation. *Id.*

In this case, the en banc majority viewed the cross as inextricably intertwined with a Christian message. On that basis, the majority differentiated upon the basis of religious viewpoint two groups of bidders–those who wanted to preserve the cross (and thus, in the court's view, further a Christian message) and those who did not. Such a religious-based classification is subject to strict scrutiny analysis.[23] *See id.* The threshold question is whether such a classification is

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[23] "Just as we subject to the most exacting scrutiny laws that make classifications based on race. . .so too we strictly scrutinize governmental classifications based on religion." See *Employment Division v. Smith*, 494 U.S. 872 at 890, fn 3, citing *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Torcaso v. Watkins*, 367 U.S. 488 (1961).

narrowly tailored to address a compelling state interest. The Court has never ruled that the avoidance of a state constitutional violation constitutes a compelling state interest for purposes of federal Equal Protection analysis.[24] Likewise, an Establishment Clause violation has also never been definitively deemed a compelling state interest. Even if it was, there was neither a No Aid Clause nor an Establishment Clause violation in this case. *See* paragraph C, *infra*.

Even assuming a No Aid Clause violation constitutes a compelling state interest, however, the en banc majority's classification on the basis of religious viewpoint is over-inclusive and not narrowly tailored to address this interest. In particular, those bidders wishing to preserve the cross, as here, may wish to further improve upon the land besides simply maintaining the cross. By not providing a subsidy to these individuals as well, the Ninth Circuit is requiring that the City penalize these groups in the bidding process above and beyond any potential need to simply comply with the No Aid Clause.[25] The en banc majority's classification is also over-inclusive in that it requires the penalization of all those who wished to preserve the cross regardless of whether they actually had any subjective intent to further a religious purpose.

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[24] At least one legal commentator has taken the position that any Blaine Amendment (and therefore the California No Aid Clause) may likely violate the Equal Protection Clause and therefore be unconstitutional *per se*. 86 Va. L. Rev. 117, 140-152 (2000).

[25] The Association's bid committed it to develop a veteran's memorial consisting of massive walls for the placement of about a thousand plaques honoring veterans; landscaping; walkways; private property signage and a flag pole. The Association's purchase proposal is reprinted and attached as Exhibit "H".

C. THE OPEN "AS-IS" SALE TO THE HIGHEST BIDDER OF PUBLIC LAND CONTAINING A RELIGIOUS FIXTURE IS NOT UNCONSTITUTIONAL UNDER THE FEDERAL ESTABLISHMENT CLAUSE OR THE NO AID CLAUSE

1. The City's Sale Did Not Violate The Federal Establishment Clause

Rather than erecting a total wall between religion and the state, the Supreme Court has established a three-part test to determine whether government action violates the Establishment Clause: (1) the program must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and, (3) the action must not foster excessive government entanglement with religion.[26] *Lemon*, 403 U.S. 602 at 612-613.

a. The City's Sale Furthered A Secular Purpose

"A practice will stumble on the purpose prong only if it is motivated wholly by an impermissible purpose." *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993)(internal citations omitted). "A reviewing court must be reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose." *Id.* As previously mentioned, the sale of the public land containing the cross furthered the secular purpose of divesting the City fully and completely of any affiliation with the cross in compliance with the No

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[26] The United States Supreme Court has recently recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining governmental action's primary effect under the second prong of *Lemon*. *Agostini*, 521 U.S. 203 at 222-223.

Preference Clause and the federal Establishment Clause. *See Christian Science Reading Room*, 784 F.2d at 1014. The sale also served the "undeniably appropriate secular purpose" of having the property be used as a war memorial. *See Paulson*, 294 F.3d at 1132.

b. The City's Sale Did Not Have The Primary Effect Of Advancing Religion

In examining the primary effect of governmental action with religious implications, the High Court has recently looked to three primary criteria: (1) whether it results in governmental indoctrination; (2) whether the action defines its recipients by reference to religion; and, (3) whether it creates excessive entanglement. *Agostini v. Felton*, 521 U.S. 203, 206 (1997); *Mitchell*, 530 U.S. 793 (2000). With respect to governmental indoctrination, the Court generally relies on two main factors in upholding the constitutionality of governmental action: neutrality and private choice.

In the case at bar, there were four criteria[27] that the City considered in determining who was to be awarded the public land containing the cross fixture. All of these criteria were not only neutral, but also secular; there was no reference to religion or religious preference because there was none.[28] The fact that a successful bid was available to both religious and non-religious bidders is demonstrated by

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[27] These four criteria are as follows: (1) Bid amount; (2) Financial capability; (3) Expertise regarding the proposed use; and, (4) The use proposed–without regard to whether or not such proposal includes the retention or maintenance of a cross. *See Paulson*, 294 F.3d at 1127.

[28] The en banc majority does not dispute the district court's findings of fact regarding the neutrality of these four selection criteria and the City's neutrality in applying them. App. 9a.

the Association, a private, secular organization, being awarded the sale of the land containing the cross.

Private choice is particularly significant because any perceived religious message or advancement of a religious mission is reasonably attributable to the individual, not the government. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2462 (2002). Here, the fate of the cross was to be solely determined by the private choice of the successful bidder who had the discretion to maintain or remove the cross.

Although the City's sale of the public land contemplated conveyance of the cross, there is no Establishment Clause violation where government is a "mere conduit" for the provision of benefits. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (provision of government-funded interpreter who was "mouthpiece" to provide Catholic doctrine translation was constitutional); *See also Hunt v. McNair*, 413 U.S. 734, 745, fn 7 (1973). Here, if anything, the City's sale was a "mere conduit" for the cross to be transferred to the winning bidder. Based on the religious neutrality of the selection criteria utilized and the fact that the fate of the cross was determined by private choice, the City's sale did not have the primary effect of advancing religion.

c. The City's Sale Did Not Foster Excessive Entanglement With Religion

Contrary to fostering excessive entanglement with religion, the City's sale involved the full divestiture of any interest by the City of substantially all of the developed land surrounding the cross. App. 45a-48a. The City does not maintain or provide any services to the property including the cross, which was erected by the Association and has always been owned by it. App. 2a-3a, 92a, 98a; *Ellis*, 990 F.2d at 1521. Thus, there is no entanglement with religion.

d. Other Significant Factors Demonstrate That The City's Sale Survives Establishment Clause Scrutiny

In determining that the City's sale was unconstitutional, the en banc majority relied on a strict economic analysis of governmental aid that has been repeatedly rejected by the United States Supreme Court.[29] That is, the Ninth Circuit in this case held that since the City conveyed the cross fixture *gratis* with the sale of the land, those bidders who wished to preserve the cross were provided a financial incentive to be able to bid to the full extent of their resources.

However, "the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 658 (1980). Furthermore, just because an aid program benefits a religious viewpoint by providing a benefit not previously received "does not mean that the program, by reducing the cost . . . creates an incentive. For *any* aid will have some such effect." *Mitchell*, 530 U.S. 793, 814 (2000) (internal citations omitted). If governmental aid can be given to a sectarian institution, certainly such aid can be given to a secular one.

Finally, in the only published opinion dealing directly with the issue of the constitutionality of a sale of public property containing a religious fixture, the Seventh Circuit deemed that a direct sale of 0.15 acres of public land containing a statue of Jesus Christ to the organization that had originally erected it was not a violation of the

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[29] In so doing, the en banc majority primarily relied on a fictional hypothetical of two bidders each bidding $35,000 that is not supported by the record in this case. *See Paulson*, 294 F.3d at 1133.

Establishment Clause, notwithstanding the religious character of the fixture. *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). Here, the City went beyond the method of sale upheld in that case by using an open, neutral bid process to sell over a half-acre of public land to the highest bidder. *See Freedom From Religious Foundation, Inc.*, 203 F.3d 487at 491. In light of all of the foregoing, there is no Establishment Clause violation.

2. *The City's Sale Did Not Violate The No Aid Clause*

In order for there to be even any need to conduct analysis under the No Aid Clause, there first must be some provision of governmental aid. Here, the Ninth Circuit identified the conveyance of the cross *gratis* as the governmental aid provided. However, no governmental aid was provided for two main reasons: (1) the cross was originally paid for and erected by the Association, the successful bidder, and was never owned by the City; and, (2) those bidders placing value on the cross would have factored it into their bid price. Even assuming otherwise, California case law and Attorney General opinions have concluded that a fair market value transaction does not constitute aid under the No Aid Clause.

The No Aid Clause *only* prohibits *governmental* aid for religious purposes. It does not prohibit private organizations from providing benefits to other private organizations. Because the City never owned the cross, the City could not have given it away. If any aid was being granted for religious purposes, it was the Association, a private, secular organization, which was conferring it because the Association was to quitclaim its interest to the

cross to the bid winner.[30] App. 5a. Even if it could be said that the cross was somehow conveyed through the City, where the City only acts as a conduit, there is no constitutional impropriety. 62 Cal.Atty.Gen.Ops 562, 563-64 (1979)(No Aid Clause inapplicable where state acts as mere conduit administering federal funds); *See Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 4-5 (1993) (state-employed interpreter acting as mouthpiece for religious instruction in Catholic school upheld as constitutional).

Furthermore, to say as the Ninth Circuit did, that the conveyance of a fixture with real property constitutes giving away the fixture *gratis* is to ignore a basic tenet of real property law. As a general, widely-known proposition, fixtures–religious or otherwise– convey to successive property owners. *Drake v. Martin*, 30 Cal.App.4th 984, 994 (1994). Where one bids on real property knowing that a fixture conveys with the property, it is specious to say that the fixture is provided *gratis*. Just as land sold in fee simple on which there sits a building does not amount to giving the building away for free, here the cross was part of the land atop Mt. Soledad. In reality, bidders who placed value on such a fixture would factor it into their bid price. In such a situation, there is no grant of governmental aid in violation of the No Aid Clause. *See* 58 Ca.Atty.Gen.Ops 857, 864 (1975) (Where fair rental value is charged, no grant of aid to religious school in violation of Article XVI, section 5).

Although interpreted to forbid all forms of aid for religious purposes, the No Aid Clause has never been expansively interpreted to forbid aid given to a private,

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[30] The Association which was awarded the land as the highest bidder was conferred no benefit because it had already paid for the erection of the cross in the first instance and continued to own it throughout these proceedings. App. 92a, 98a. No benefit was conveyed to the Association because it paid for everything it received.

secular organization. *See Calif. Educ. Facilities Auth.*, 12 Cal.3d at 596. Of the cases cited by the en banc majority in which there were violations of the No Aid Clause, it is significant that they all involved aid to formal religious institutions or organizations or at least, those with a religious purpose.[31] In fact, the No Aid Clause originated from concern about governmental aid in its different forms being provided to religious groups, not secular ones.

Even if the Association was a sectarian organization, Article XVI, section 5 does not prevent the government from entering into real estate transactions with religiously affiliated groups wishing to use the property for religious purposes provided the transaction furthers a primarily secular purpose and is made at arm's length. *Woodland Hills Homeowners Organization v. Los Angeles Comm. College Dist.*, 218 Cal.App.3d 79, 95 (1990); *Christian Science Reading Room*, 784 F.2d at 1015-16. A public auction sale of property to the highest bidder, as here, "where price is established by competitive bidding" cannot be regarded as providing aid to the buyer for purposes of the No Aid Clause. 25 Ca.Atty.Gen.Ops 309 at 313 (1955). In this case, no aid was provided because the award was made to the highest bidder and the sales price was $106,000, over three times the minimum acceptable amount of $35,000.

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[31] These cases are: *Feminist Women's Health Center v. Philibosian*, 157 Cal.App.3d 1076, 1080 (1984) (government aid to Catholic League to hold religious burial service); *County of Los Angeles v. Hollinger*, 221 Cal.App.2d 154 (1963) (government aid to sectarian Christian organization to enter contract to promote religious parade); *Frohliger v. Richardson*, 63 Cal.App. 209 (1923) (government aid to appropriate money to preserve religious mission owned and actively used by Roman Catholic Church); *California Teachers Association v. Riles*, 29 Cal.3d 794 (1981) (governmental aid to sectarian schools to loan textbooks worth millions of dollars without charge).

Despite the en banc majority's logic that anything which furthers the preservation of the cross furthers a religious purpose, the cross, in and of itself, is not inextricably intertwined with a religious message.[32] For example, were the cross to sit atop a church steeple, it would clearly be an endorsement of Christianity. Here, however, the cross sits atop a private memorial site in a public park adorned with nearly 1,000 black granite plaques honoring our country's military veterans--living and deceased. Akin to a cemetery, the purpose of the cross and its message to a reasonable observer is to connote peace, solemnity, and reverence for those who have risked and given their lives to defend our nation and the principles for which it stands. Were it otherwise, many national cemeteries, including the crosses at Arlington National Cemetery, would also have to be deemed unconstitutional.

Significantly, the en banc majority altogether failed to conduct any substantive analysis into the California Supreme Court's most recent pronouncement on the No Aid Clause. App. 9a. In a markedly clear circumstance of conferring benefit upon religion in *East Bay Asian*, the California Supreme Court ruled that the exemption of religious organizations from generally applicable landmark preservation laws did not violate the No Aid Clause.

Where a law simply allows for the status quo, any benefit to religion is indirect, remote, and incidental. *Id.* at

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[32] Even if it were, "[i]t is of no importance that the property in question may be better adapted for use by a particular bidder, for a State does not consider the possible uses which may be made of the property, provided such uses are legally permissible." 25 Ca.Atty.Gen.Ops at 313. The Supreme Court upheld governmental aid to Salpointe Catholic High School, even though it was stipulated by the parties that "[t]he two functions of secular education and advancement of religious values and beliefs were inextricably intertwined throughout the operations at Salpointe." *Zobrest*, 509 U.S. at 4, fn 1.

722. This is true even though this exemption is only available to religious organizations and allowed them to avoid costly restrictions and regulations to which non-religious groups are subjected. The fact that non-religious groups are not benefitted is "not relevant in assessing neutrality since landmark status for properties they own does not threaten any free exercise rights of those organizations." *Id.* at 715. The exemption is justified because of "a *potential* burden on free exercise" of religious entities. *Id.* at 710 (Emphasis added).

By conducting an open bid as-is sale of the property at fair market value and giving the bid winner full discretion to maintain or remove the cross, the City remained scrupulously neutral towards religion. The City not only avoided imposing any potential burden on the free exercise rights of religious bidders, but also avoided any preference for religion in violation of the constitutional rights of non-religious bidders. By neither requiring nor precluding the maintenance of the cross, the City, like the state in *East Bay Asian*, "simply stepped out of the way of religion." *Id.* at 717.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILIP K. PAULSON,

Plaintiff-Appellant,

v.

CITY OF SAN DIEGO; MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,

Defendants-Appellees.

No. 00-55406
D.C. No. CV-89-00820-GT

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

ARGUED AND SUBMITTED EN BANC MARCH 21, 2002 PHOENIX, ARIZONA
FILED JUNE 26, 2002

Before: Mary M. Schroeder, Chief Judge, and Harry Pregerson, Alex Kozinski, Ferdinand F. Fernandez, Pamela Ann Rymer, Thomas G. Nelson, Michael Daly Hawkins, Susan P. Graber, William A. Fletcher, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

OPINION

GRABER, Circuit Judge:

This appeal is the latest chapter in a protracted saga centered around a 43-foot-high Latin cross that stands atop Mt. Soledad in San Diego, California. In an earlier chapter, we held that the presence of the cross in a publicly owned park violates the California Constitution, and we therefore affirmed an injunction forbidding the city from maintaining the cross on public land. In this chapter, we hold that the way in which the City of San Diego sold the cross to a private entity, which now maintains the cross, also violates the California Constitution. Because both the constitutional infirmity and the injunction remain in place, we return the case to the district court to write the next installment.

BACKGROUND

The City of San Diego (City) owns Mt. Soledad, a 170-acre parcel of land that was dedicated to public use in 1916 as "Mt. Soledad Natural Park." Although most of the park is undeveloped and is maintained in its natural state, the top of the mountain has been cleared. The cross in question, which is constructed of concrete, stands in the center of the clearing where it was erected by the Mt. Soledad Memorial Association (Association) in 1954.

This cross is the third that has stood atop Mt. Soledad. The first was constructed by private citizens out of redwood in 1913. Vandals destroyed it in 1924. In 1934, someone replaced it with a cross made of wood and stucco. A windstorm destroyed that cross in 1952.

The San Diego City Council then granted permission to the Association to construct the current cross. In 1954, in a religious service held on Easter Sunday, the Association dedicated the cross as a tribute to veterans of World War I, World War II, and the Korean Conflict. The Association

maintains the cross and obtains a permit from the City each year to host an Easter service at the cross. The cross also has been the site of weddings and baptisms. Although the Association has paid for most of the maintenance costs associated with the cross, public funds have been expended to maintain it as well.

Plaintiff Philip K. Paulson initiated this action in 1989, seeking to enjoin the City from allowing the Mt. Soledad cross to remain on public land. In 1991, the district court ruled that the presence of the cross in a publicly owned park violates the No Preference Clause of the California Constitution, article I, section 4. *Murphy v. Bilbray*, 782 F. Supp.1420, 1438 (S.D. Cal. 1991), *aff'd sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993). The court permanently enjoined the presence of the cross on publicly owned land. In our opinion affirming the injunction, we recognized that the Mt. Soledad cross, to the extent that it could be characterized accurately as a war memorial, was "[a] sectarian war memorial carr[ying] an inherently religious message and creat[ing] an appearance of honoring only those servicemen of that particular religion." Ellis, 990 F.2d at 1527.

To remedy the constitutional violation and to comply with the injunction, the City decided to sell the land under the cross to a private organization. In order to accomplish the sale, and acting pursuant to section 55 of the City of San Diego Charter, the City submitted "Proposition F" to the voters in the 1992 election. That proposition provided:

> Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to *maintain* the property as *an historic war memorial*, and the transfer of the same parcel by The City of San Diego to a private non-profit corporation for not less than fair market value be ratified?

(Emphasis added.)

The City's mayor and deputy mayor and several City Council members submitted a statement to the Voter Information Pamphlet in support of Proposition F. They explained that the purpose of Proposition F was to authorize the transfer of the land under the Mt. Soledad cross to the Association in order to "SAVE THE CROSS." The argument described the cross as a "historic landmark and a dedicated war memorial," and they urged a "YES" vote on the measure to "SAVE THE MOUNT SOLEDAD CROSS. SAVE OUR HISTORY." The voters approved the measure by a 76 percent majority.

Thereafter, the City sold approximately 222 square feet of land under the cross to the Association, in a negotiated sale for fair market value. Consistent with the statement in support of Proposition F contained in the voter pamphlet, the City sold the land to the Association, which had stated its intention to maintain the cross. The City did not solicit offers or consider proposals from any other prospective purchasers.

In September 1997, ruling on Paulson's motion to enforce the injunction, the district court held that this method of sale violated the No Preference Clause of article I, section 4, of the California Constitution. *Murphy v. Bilbray*, No. 90-134, 1997 WL 754604 (S.D. Cal. Sept. 18, 1997) (unpublished decision). The court found that the sale complied with the City Charter and other policies governing negotiated sales. *Id.* at *7-*8. However, the court also found that the City's failure to consider other prospective buyers created the appearance that the City preferred the Christian religion and that the City's primary purpose for the sale was to preserve the cross. *Id.* at *10. The court further ruled that the amount of land sold was too small to remedy the City's original constitutional violation. *Id.* at *11. It reasoned that, because the parcel of land sold was so small,

and was surrounded by land owned and maintained by the City, most visitors would not be aware that the City did not own and maintain the cross. That being so, the City had not remedied the appearance of preference. *Id.* The court entered an order stating: "Both the method of sale and the amount of land sold underneath the Mt. Soledad cross do not cure the constitutional infirmities outlined in this Court's previous Order." *Id.*

Following the district court's 1997 order, the City again attempted to dispose of the land beneath the cross. It expanded the size of the parcel available for purchase to 0.509 acres, and it published a notice that the City was inviting bids on the land. The City arranged for the Association "to quitclaim any property interests it may have in Mt. Soledad Natural Park, through escrow, to a future buyer as authorized by City Council." In exchange for the Association's agreement to quitclaim its interests in Mt. Soledad Natural Park, the City authorized an expenditure of $14,500 to refund to the Association its purchase money for the first sale.[1] The City received 42 requests for the bid proposal packets.

The introduction to "The City of San Diego's Invitation for Purchase Proposals[:] Mt. Soledad Memorial Site" stated:

> The City of San Diego is inviting proposals from private non-profit corporations interested in purchasing approximately one-half acre of property in the Mt. Soledad Natural Park *for the purpose of maintaining an historic war memorial.* The property is presently the site of a large, concrete, Latin cross. The City is neither requiring nor precluding the

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[1] Because the City Council decided to sell the parcel to the Association at the second sale, the escrow arrangement was never put into effect. Instead, the Association simply received a $14,500 credit against its bid in the second sale.

> retention or maintenance of a cross in its invitation for proposals.

(Emphasis added.) The Invitation clarified that the parcel of land for sale included land on which the cross stands. It further informed potential buyers of the Association's agreement to quitclaim its interests in the parcel for sale.

The Invitation explained that prospective purchasers had to submit four items. First, a proposal was required to include a "summary of the experience of the proposer and its qualifications to *maintain* the property as *an historic war memorial*." (Emphasis added.) The Invitation did not elaborate on what sort of qualifications were relevant to the maintenance of "an historic war memorial." Second, a proposer was required to submit a financial statement listing the proposer's current assets and liabilities and establishing the proposer's "financial ability to fund the full amount of the bid." Third, a proposer was required to describe the "Proposed Use" in a "[d]etailed outline for *the maintenance of an historic war memorial*, as authorized in the June, 1992, election." (Emphasis added.) Fourth and finally, the proposer was asked to submit a $5,000 deposit.

The Invitation outlined the criteria on which proposals would be evaluated:

1. Bid on the sale price.
2. Financial capability.
3. Expertise regarding the proposed use.
4. The use proposed--without regard to whether or not such proposal includes the retention or maintenance of a cross.

The Invitation did not explain how each factor would be weighted in the selection process, nor did it explain the criteria against which the proposed uses would be measured.

In response to the Invitation, five entities submitted proposals: the Mt. Soledad Memorial Association, Horizon Christian Fellowship, National League for the Separation of Church and State, St. Vincent DePaul Management, and Freedom From Religion Foundation. Three proposers – the Association, Horizon, and St. Vincent DePaul – stated that they intended to retain the current cross as a war memorial. The National League for the Separation of Church and State proposed a memorial to honor veterans and the Bill of Rights. The Freedom From Religion Foundation proposed a memorial to honor atheists and freethinkers.

Using forms entitled "Proposal Evaluation Notes," a three-member committee assessed the proposals based on the offer made, the proposer's financial capability both to fund the bid and to maintain a memorial, the proposer's experience, the proposer's operating plan, the proposer's responsiveness, and "other strengths or weaknesses." After conducting its review, the committee recommended that the City Council approve the sale to the Association. Speaking to the City Council on behalf of the committee, Will Griffith, the City's Acting Director of the Real Estate Assets Department, reported that the committee had determined that the minimum acceptable bid was $35,000. He then said:

> Based on our analysis and, and looking at these four categories, the RFP committee will be making a recommendation to choose the Mt. Soledad Memorial Association. The reason for this is that they put together overall the most comprehensive, well thought out proposal of all of the bids. Also, their bid price was the highest. Although they did make some

> statements that $106,000 was going to substantially deplete their reserves in their organization, they have shown a very strong track record over the 46 years of being involved in the memorial to being able to go out and solicit funds. They have ties with some of the veterans groups and have been able to solicit funds for maintenance of the, of the existing memorial.

The City Council members who were at the meeting voted unanimously to approve the sale to the Association.[2]

Paulson again brought a motion to enforce the injunction against the presence of the cross. He again argued that the method of sale violated the California Constitution because it favored the Association. He also argued that the amount of land sold was too small to cure the appearance of a preference.

This time, the district court denied Paulson's motion. The court concluded that the sale was not structured to prefer the Association, based on its determination that the City had established a "neutral" process for evaluating bids and that the City had sold the land to the Association because it was the highest bidder. Finally, the court held that, because the sale involved an "open and apparently neutral bidding process," the method of sale "did not violate the California Constitution's prohibition against the preference of religion."

STANDARDS OF REVIEW

We review for abuse of discretion the district court's decision not to enforce an injunction. *Herrington v. County of Sonoma,* 12 F.3d 901, 907 (9th Cir. 1993). The district court abuses its discretion if (among other things) it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* at 907-08.

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[2] One member was absent on the day of the vote.

We review de novo the district court's interpretation of state law. *Churchill v. F/V Fjord* (*In re McLinn*), 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc). When interpreting state law, we are bound to follow the decisions of the state's highest court. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). "When the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." *Id.*

DISCUSSION

Plaintiff argues that the second sale of the land violates two provisions of the California Constitution: article I, section 4, which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference," and article XVI, section 5, which prohibits aid to "any religious sect, church, creed, or sectarian purpose." The district court recognized that Plaintiff premised his motion to enforce the injunction on those similar, but distinct, constitutional provisions, yet the court failed to analyze the sale separately under each provision. The California Supreme Court has made clear that the determination whether government conduct violates article I, section 4, requires a different analysis from the determination whether the same conduct contravenes article XVI, section 5. *See E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1139-40 (Cal. 2000) (analyzing the No Preference Clause of article I, section 4, by reference to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), while analyzing article XVI, section 5, under a separate, state-law framework), *cert. denied*, 532 U.S. 1008 (2001). The district court thus made an error of law (and consequently abused its discretion) when it failed to analyze separately the requirements of article XVI, section 5.[3] To address that error,

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[3] None of the district court's findings of historical fact is clearly erroneous.

we examine article XVI, section 5, of the California Constitution.

Under California law, "[w]hen construing a constitution, courts view as the paramount consideration the intent of those who enacted the provision at issue. To determine that intent, courts look first to the language of the constitutional text, giving the words their ordinary meaning." *Leone v. Med. Bd. of Cal.*, 995 P.2d 191, 194 (Cal. 2000) (citations omitted). Accordingly, we begin with the constitutional text at issue.

Article XVI, section 5, of the California Constitution[4] provides, in pertinent part:

> Neither the legislature, *nor any* county, *city and county*, township, school district, or other municipal corporation, *shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose,* or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; *nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.*

(Emphasis added.)

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[4] This provision was formerly numbered article XIII, section 24. West's Ann. Cal. Const. art. 16, § 5; *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 520 (Cal. 1974). Before that, it was numbered article IV, section 30. West's Ann. Cal. Const. art. 16, § 5; *Frohliger v. Richardson*, 218 P. 497, 498 (Cal. Dist. Ct. App. 1923). The text has remained substantially constant. For convenience, we will refer to it as article XVI, section 5, throughout our discussion.

Given the ordinary meaning of those words, the text of the provision has enormous breadth. It is possible for the government's transfer of "anything" to violate the provision if the transfer is "in aid of" any "sectarian purpose." Therefore, all forms of governmental "aid" are subject to scrutiny. Further, when this provision was adopted in 1879, the term "purpose" commonly meant in this context an "[e]nd; effect; [or] consequence." Worcester, Joseph E., A Dictionary of the English Language 1158 (New ed. Supp. 1897). In other words, aid to a sectarian purpose simply meant aid to a sectarian use. Moreover, the section specifically prohibits the transfer of real or personal property for any "sectarian purpose."

The relevant California Supreme Court cases confirm our view that the text of article XVI, section 5, is expansive. It "forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.'" *E. Bay*, 13 P.3d at 1140 (quoting *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 n.12 (Cal. 1974)). Indeed, the court has stated that this section is "the d[e]finitive statement of the principle of government impartiality in the field of religion." Priest, 526 P.2d at 520 (citation and internal quotation marks omitted). According to the California Supreme Court, this section was intended by its framers "to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes." *Id.*

Neither the California Supreme Court nor any California Court of Appeal has considered the application of article XVI, section 5, to facts resembling those presented in this case, even though the decided cases cover a wide range of disparate topics. Nonetheless, we distill three themes from the precedents.

First, article XVI, section 5, is so broad that state or local governments need not provide a financial benefit or tangible aid in order to violate the provision; they violate it by doing no more than lending their "prestige and power" to a "sectarian purpose." *Feminist Women's Health Ctr., Inc. v. Philibosian*, 203 Cal. Rptr. 918, 920-22, 927 (1984) (holding that, although state law authorized the district attorney to dispose of evidentiary fetal tissue by interment, to inter the tissue at a location where a religious memorial ceremony would be held would unconstitutionally "enlist the prestige and power of the state" in the burial ceremony).

Second, even a government act that has a secular purpose can violate article XVI, section 5, if it also has a direct, immediate, and substantial effect of promoting a sectarian purpose. Thus, in *Frohliger v. Richardson*, 218 P. 497, 500 (1923), the California District Court of Appeal held that article XVI, section 5, bars public aid for the purpose of restoring the California missions, despite the undeniable importance of the missions to the history of California:

> We concede that the California missions are of historical and educational interest from a cultural and literary standpoint, but they approach no such classification as would make them the basis of the state's bounty or the subject of legislative appropriation in the guise of the public interest, public good, or public welfare.

The presence of a financial benefit to the owner of the missions--the Catholic Church--rendered the aid invalid. *Id.*

Similarly, in *County of Los Angeles v. Hollinger*, 34 Cal. Rptr. 387, 388, 392-93 (1963), the fact that Los Angeles County had a secular purpose--promoting commerce and tourism--for ordering films of a Christian holiday parade from a parade association did not prevent the contract for the films

from violating article XVI, section 5. The arrangement was unconstitutional because the making of the films and the county's use of them would provide forbidden, "official" support for both the organization and the religious subject matter of the parade. *Id.* at 391-92.

Likewise, in *California Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (1981), the California Supreme Court invalidated a state textbook loan program under article XVI, section 5. Although the program was open to students in all nonprofit, nonpublic schools (not just sectarian schools) and provided the books to the eligible students (not to the schools) the supreme court nevertheless held that the program unconstitutionally aided sectarian schools, because textbooks "are a critical element in enabling the school to carry out its essential mission to teach the students." *Id.* at 953 n.1, 963.

The *third* and final theme to emerge from the California cases construing article XVI, section 5, is a corollary to the second theme: Government conduct that aids religious or sectarian purposes, but that does *not* have a direct, immediate, and substantial effect, does not contravene the provision. *E. Bay*, 13 P.3d at 1140. The section "does not prohibit indirect, remote, or incidental benefits that have a primary public purpose." Id. For the purpose of article XVI, section 5, a benefit related to a "primary public purpose" qualifies as "indirect, remote, or incidental" if it is available "on an equal basis" to sectarian and nonsectarian organizations *and* if it "does not have a substantial effect of supporting religious activities." *Priest*, 526 P.2d at 521-22. For example, in *Priest*, the California Supreme Court upheld a statutory program that permitted colleges--both sectarian and nonsectarian--to borrow money at below-market rates for improvements to their facilities, so long as the relevant facilities were not used for sectarian purposes. *Priest*, 526 P.2d at 515, 521-22. The supreme court reasoned that any aid to sectarian purposes was

merely incidental to the Act's primary public purpose of encouraging higher education. *Id.* at 521.

In the same vein, and relevant to this case, the California Court of Appeal held in *Woodland Hills Homeowners Organization v. Los Angeles Community College District*, 266 Cal. Rptr. 767, 774 & n.9, 777 (Ct. App. 1990), that the long-term lease of land by a community college district to a synagogue did not violate article XVI, section 5. The court characterized the benefit to the synagogue from the lease as "incidental" to the district's primary public purpose of making money from the land, in part because "[t]he evidence established that religious and secular groups had equal opportunity to obtain the government benefit." *Id.* at 776; *see also Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1014, 1016 (9th Cir.), *amended by* 729 F.2d 124 (9th Cir. 1986) (holding that the rental of commercial space in a publicly owned airport for use as a Christian Science reading room did not violate article XVI, section 5, because the benefit to religion qualified as incidental: "[T]here is no suggestion that all religions did not have the same opportunity to rent space, or that groups with views opposed to organized religion, or with any other social or philosophical view, were denied that opportunity.").

In summary, the California appellate cases make clear that article XVI, section 5, prohibits the government from (1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government's secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental. A sectarian benefit that is ancillary to a primary secular purpose may qualify as "incidental" if the benefit is available on an equal basis to those with sectarian and those with secular objectives. With those principles in mind, we examine whether the second sale of the Mt. Soledad land to the Association violated article XVI, section 5.

In view of our holding in *Ellis* that the Mt. Soledad cross is a sectarian symbol that conveys a religious message, governmental conduct that operates affirmatively to preserve the cross aids a sectarian purpose: the preservation of a symbol that conveys a specifically Christian message.[5] *Cf. Frohliger*, 218 P. at 500 (holding that the "meritorious movement" to restore and preserve Catholic missions could not be accomplished constitutionally through public assistance). The question then becomes whether the manner in which the City structured the sale directly, immediately, and substantially aided the sectarian purpose of preserving the cross. *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1385 (9th Cir. 1994). Because the structure of the sale provided a financial incentive to maintain the cross, the answer is "yes."

Here, the City sought to sell the land atop Mt. Soledad for the undeniably appropriate secular purpose of ensuring the presence of a war memorial on the site. California law nevertheless requires us to analyze whether the City's conduct *also* aided a sectarian purpose. Complicating matters for the City is the fact that the land for sale is the site of the cross, a sectarian war memorial. In the Invitation, the City made clear that (1) the cross would be conveyed to the purchaser of the

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[5] As noted above, the phrase "sectarian purpose" merely connotes a sectarian use rather than a subjective state of mind. However, even if a subjective goal on the part of the City were required here, a "sectarian purpose" is shown. For example, the City wrote its invitation for bids to state that the proposed sale was "for the purpose of maintaining an historical war memorial." The only war memorial in that location that could qualify as "historic" was the cross.

land,[6] (2) the purchaser could satisfy the condition that the site be used as a war memorial by keeping the cross there, and (3) the highest purchase price and the buyer's financial capability were keys to a successful bid. The City thereby granted a direct, immediate, and substantial benefit in aid of a Christian message. To those potential buyers who wanted to preserve the cross or convey its message, the City gave away for free an economically valuable means of fulfilling the main condition of the sale. By contrast, to those potential buyers who wanted to construct a nonsectarian war memorial, the City conveyed nothing that would help satisfy the obligation to maintain the site as a war memorial. To the contrary, those purchasers would be saddled with the costs of removing the cross and of constructing an alternative memorial.

The immediacy of the benefit is readily apparent; no further action by anyone stood between the City and the beneficiary of the grant. That the benefit was not merely incidental to the City's primary secular purpose in conveying the land also is readily apparent. Because the sale was structured to provide a valuable financial benefit to those supporting the preservation of the cross, it cannot be said that

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[6] Earlier in this litigation it was unclear who owned the cross--the Association nor the City. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1530-31 (9th Cir. 1993) (Beezer, J., specially concurring). When the first sale was invalidated, the City arranged to give back the Association's purchase money in exchange for the Association's agreement to quitclaim "any property interests" it had in Mt. Soledad Natural Park to the future purchaser of the land, so that the land--cross and all--could be conveyed to the next purchaser.

Even if the quitclaim agreement was not intended to convey the Association's interest in the cross, the second sale would still fail because, in that event, the sale was structured to give *the Association alone* a financial benefit from the unconstitutionally maintained cross, to the detriment of other bidders who were not similarly permitted to benefit from a longstanding unconstitutional relationship with the City.

the benefit provided by the sale was available "on an equal basis" to potential buyers who had the purpose of constructing a secular memorial.

That the financial benefit to a bidder proposing to preserve the cross was both direct and substantial is best illustrated by an example. Suppose that two similarly situated bidders--Bidder #1 and Bidder #2--each had the minimum acceptable amount of $35,000 to bid on the project, and Bidder #1 proposed to retain the cross, while Bidder #2 proposed to construct a secular memorial. The structure of the sale ensured that Bidder #1 would be awarded the land. Bidder #1 could bid the full $35,000 and still demonstrate the financial capability to maintain a historic war memorial because the City would subsidize the cost of Bidder #1's proposed memorial by conveying the cross. Bidder #2 could not compete successfully with Bidder #1: If Bidder #2 matched Bidder #1's bid, then Bidder #2 could not demonstrate the financial capability to maintain a historic war memorial, because all of Bidder #2's resources would have been dedicated to the bid price, and none would have been reserved to fund removal of the cross and construction of a new memorial. Alternatively, Bidder #2 could reserve the money needed to remove the cross and construct the new memorial. But that option would eliminate Bidder #2 from the process, because Bidder #2's bid in that instance would fall below the minimum acceptable bid.

In short, by establishing a specified use as a condition of sale (the maintenance of a war memorial) and then providing gratis the means to satisfy that condition to only those bidders who supported the preservation of the cross, the City gave a direct, immediate, and substantial economic incentive to advance a sectarian message. An economic incentive of that kind and magnitude qualifies as aid to a sectarian purpose within the meaning of article XVI, section 5; it enlisted the power and prestige of the City in support of the preservation of

the cross, devoted financial resources of the City government to a sectarian purpose, and granted City property for a sectarian purpose.

The effect of the City's aid to a sectarian purpose is evident, as a practical matter, in the outcome of the sale challenged in this action. Because the Association intended to preserve the cross, and thus had no need to reserve funds for removal or construction costs, it was able to bid $106,000--the full extent of its resources. Had the Association not been able to rely on the retention of the cross (at no cost) to satisfy the condition that the site be maintained as a war memorial, its bid necessarily would have been lower. Although we cannot tell from the record whether the bid ultimately would have been less than the bids of those who proposed a secular memorial, the advantage to the Association of being able to expend the entirety of its resources on the bid price, while still being able to meet the other criteria for sale, was direct, immediate, and substantial.

CONCLUSION

The second sale of the Mt. Soledad land on which the cross stands was structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross. For that reason, the sale violated article XVI, section 5, of the California Constitution.[7]

No doubt there are several possible ways to cure this violation. We leave it to the parties and to the district court, in

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[7] Because we hold that the method of sale violated article XVI, section 5, we do not reach Plaintiff's argument under article I, section 4, of the California Constitution or under the First Amendment to the United States Constitution, and we express no view on those questions.

the first instance, to devise a remedy for the constitutional violation that we identified in *Ellis*.

REVERSED and REMANDED.

FERNANDEZ, Circuit Judge, with whom RYMER, T.G NELSON, and RAWLINSON, Circuit Judges, join, dissenting:

This litigation has been in the federal courts for over 10 years, while Paulson and others have attempted to have the latest Mt. Soledad cross torn down.[1] Under the lash of court orders, including a prior appeal to this court,[2] the city finally satisfied the district court that it had disposed of the cross and a sufficient amount of surrounding property in a neutral process that conveyed those to the highest private bidder. There is absolutely no relevant dispute over the historical facts as found by the district court. The property did go to the highest bidder; the purchaser was required to maintain a war memorial (the site had been given over to that general purpose since 1954); but there was no restriction whatsoever on the configuration of that memorial--nothing prescribed or proscribed the removal of the cross itself.

This case, therefore, presents us with pure legal questions. Those questions were answered with clarity and precision in an opinion by a panel of this court. *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001),[3] rehearing en banc granted, 281

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[1] I say "latest" because its erection followed the erection and destruction of others in a series commencing in 1913.

[2] *See Ellis v. City of La Mesa*, 990 F.2d 1518, 1527-28 (9th Cir. 1993); *Murphy v. Bilbray*, 1997 WL 754604, at *9-*11 (S.D. Cal. Sept. 18, 1997); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1436-38 (S.D. Cal. 1991).

[3] For the convenience of the readers of this dissent, I incorporate Attachment A, which is the slip copy of the panel's opinion.

F.3d 812 (9th Cir. 2002). Unfortunately, that excellent opinion[4] has been superseded by this en banc proceeding, but I now adopt it in full as my dissent in this case.[5]

Thus, I respectfully dissent.

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[4] While I see no real need to gloss that opinion, I cannot eschew indicating that I remain troubled by the myriad of complex and convoluted tests that have arisen in the area of constitutional protection of religious rights. As I see it, the fact that a public entity is neutral on the issue of religion should suffice to meet the constitutional strictures that it neither interfere with free exercise, nor establish, nor yet prefer or discriminate against religion. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1082-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *vacated*, 534 U.S. 946, 122 S. Ct. 340, 51 L. Ed. 2d 256 (2001); *Goehring v. Brophy*, 94 F.3d 1294, 1306-07 (9th Cir. 1996) (Fernandez, J., concurring); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 383-84 (9th Cir. 1996) (en banc). The historic facts of the sale at hand demonstrate that the city did not stray from the path of neutrality. No matter how timorous or cautious we are about religion, the city's action cannot be seen as minatory.

[5] The en banc majority concentrates its attention on the California Constitution, but I adopt the panel's disposition on both United States and California constitutional grounds.

ATTACHMENT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON,

Plaintiff-Appellant,

v.

CITY OF SAN DIEGO; MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,

Defendant-Appellee.

No. 00-55406
(D.C. No. CV-89-00820-GT)

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., Senior District Judge, Presiding

ARGUED AND SUBMITTED
APRIL 4, 2001 PASADENA, CALIFORNIA
FILED AUGUST 22, 2001

Before: Procter Hug, Jr., John M. Duhe, Jr.,* and Richard C. Tallman, Circuit Judges.

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* Honorable John M. Duhe, Jr., Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

OPINION

HUG, Circuit Judge:

We are presented with the issue of whether the presence of a Latin cross on private property surrounded by publicly maintained park land atop Mount Soledad in San Diego, California, violates the California and United States Constitutions. The cross sits on land previously owned by the city of San Diego. The district court earlier had issued an injunction against the cross's presence on publicly owned land for violation of the No Preference Clause of the California Constitution. The city subsequently sold a half acre parcel beneath the cross through a publicized and open bidding process. The district court found this sale sufficient to cure the constitutionally impermissible appearance of preference for religion by the city. We agree with the district court and AFFIRM its decision denying as moot Appellant's motion to enforce the previous injunction.

I. BACKGROUND

Mount Soledad Natural Park is approximately 170 acres of land forming a mountain with a flat cleared area at the top. The flat portion has a driveway and parking area which encircles a relatively small area of land with a 43 foot high cross. Since 1913, a cross has stood in the area where the Mt. Soledad cross now stands. After a wind storm destroyed the then existing cross in 1952, the city council granted permission to the Mt. Soledad Memorial Association (the Association) to place another cross on Mt. Soledad. In 1954, the current cross was dedicated to veterans of World Wars I & II and the Korean War.

Immediately outside the parking area surrounding the cross is a cleared area with benches and a public sidewalk. The cross is visible from various places in the park and around the city

including a portion of the interstate highway. The cross has been the subject of litigation for approximately ten years. A more complete history of the events involved in the previous litigation is set forth in our decision in *Ellis v. City of LaMesa*, 990 F.2d 1518, 1527 (9th Cir. 1993). Thus, we present a summary here as it pertains to the instant decision.

In December 1991, the district court ruled that the presence of the cross on publicly owned land in Mount Soledad Park violated the No Preference Clause of the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991), *aff'd*, 990 F.2d 1518 (9th Cir. 1993). The court issued a permanent injunction forbidding the permanent presence of the cross on publicly owned land. On appeal, we affirmed the injunction, holding that the mere designation of the cross as a war memorial was not enough to satisfy the separationist No Preference Clause of the California Constitution. *Ellis*, 990 F.2d at 1528. In response to the injunction, the city sold approximately 222 square feet under the cross to the Association in a negotiated sale for fair market value. At that time, the city did not solicit or consider any bids or offers from other prospective buyers of this land and the Association clearly stated its intention to keep the cross as part of its proposed war memorial.

In September 1997, the district court ruled that both the method of sale and the amount of land sold failed to remedy the original constitutional infirmities. *See Murphy v. Bilbray*, 1997 WL 754604 (S.D. Cal. Sept. 18, 1997). Although the court found that the negotiated sale complied with requirements under the city's Charter and Council Policy, it also found the method of sale unconstitutional. Because the city sold the land to the Association in a private negotiated sale without considering any other offers or bids, the sale gave the appearance that the city was preferring the Christian religion by trying to save the cross. Also, the city sold only a tiny plot of

land, 222 square feet, directly under the cross while the remaining developed land surrounding the cross was still owned and maintained by the city. The court found that the method of sale made apparent that the city's primary purpose for the sale was to preserve the cross.

The negotiated sale with the Association did not allow any other entity the opportunity to buy the plot of land underneath the cross. The district court emphasized that it was this exclusion of any other purchasers of or bidders for the land that gave the appearance of preferring the Christian religion over all others. Additionally, the court found that under those circumstances most visitors would not be aware that the city did not own and maintain the cross and, thus, the city had not remedied the appearance of preference for religion.

In July 1998, the city sold .509 acre of land (approximately 22,172 square feet) underneath the cross. The sale was a well publicized open bidding process and resulted in the land being sold to the Association for $106,000, which was the highest bid.[1] Philip Paulson brought a motion to enforce the injunction against the presence of the cross arguing that the recent sale did not cure the constitutional problems. Specifically, Paulson contends that the city structured the bidding process to favor the Association in a continued effort to save the cross and that the parcel sold was still too small to alleviate the appearance of preference for religion.

The district court found the sale constitutional and concluded that the method of sale, amount of land sold, and the proposed improvements divested the city of any appearance of

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[1] St. Vincent de Paul Management made a bid of either $50,000 or, in the alternative, $5,000 more than the highest bidder. The committee treated the bid as a simple $50,000 offer because permitting a bid computed by reference to another bid would render the bidding process meaningless.

preference for religion. As discussed below, the Association presented plans for significant improvements to the memorial including erecting twenty-six concrete bollards, placing one every twenty feet, surrounding the memorial site with a plaque between each bollard stating "Mount Soledad Veterans' Memorial--Private Property." Accordingly, the district court denied as moot the motion to enforce the injunction. Paulson timely appealed.

II. ANALYSIS

The district court's refusal to grant a motion to enforce an injunction is tantamount to a denial of injunctive relief. *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). We will reverse such a decision only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* at 907-908. We review de novo the district court's interpretation of state law. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 335 (9th Cir. 1996).

The California constitution guarantees the "free exercise and enjoyment of religion without discrimination or preference." Cal. Const. art. I, § 4. This provision, referred to as the No Preference Clause, prohibits not only actual preference but also any appearance that the government has allied itself with one specific religion.[2] *Sands v. Morongo*

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[2] Another provision of the state constitution, Article XVI, section 5,strictly prohibits any governmental support for religious purposes. The California Supreme Court has interpreted this provision to ban any form of governmental involvement "which has the direct, immediate, and substantial effect of promoting religious purposes." *California Educ. Facilities Auth. v. Priest*,12 Cal. 3d 593, 606 n.12 (1974). Paulson has failed to establish a violation of this provision. As discussed below, the sale and transfer of land here do not have a direct, immediate and substantial effect of promoting religion.

Unified Sch. Dist., 53 Cal. 3d 863, 876 (1991); *Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991). This parallels the guarantee of the Establishment Clause of the United States Constitution, which "prohibits the government from appearing to take a position on questions of religious belief." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 594 (1989).

Although some California courts have interpreted the No Preference Clause as being more protective of the principle of separation than the federal guarantee,[3] the California Supreme Court has recently suggested otherwise. *Compare Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 916 (1989) with *East Bay Asian Local Development Corp. v. State of California*, 102 Cal.Rptr.2d 280 (2000).[4] The California Supreme Court concluded that it was not necessary to construe the No Preference Clause of the California Constitution because the government action satisfied the *Lemon* test,[5] which is applied to challenges under the Establishment Clause of the United States Constitution and, thus, was neither a governmental

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[3] The district court noted this and reviewed the challenges under the state constitution with this concept of a "Jeffersonian wall of separation between church and state" in mind, avoiding the federal constitutional questions. To the extent there is a difference between the relevant religion clauses of the federal and state constitutions, we conclude that the government action here passes muster under both.

[4] Although we recognized this earlier and broader interpretation in *Hewitt*, our opinion in that case pre-dated the California Supreme Court's recent discussion of the state constitution's religion clauses in *East Bay*.

[5] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

preference for or discrimination against religion. *Id.* at 719.[6] This suggests that the United States Constitutional standard is either equally restrictive or more restrictive than the No Preference Clause of the California Constitution.

Paulson challenges the district court's decision on two grounds. First, he objects to the method of sale, asserting that the city structured the bidding process to give the Association an advantage. Second, he contends that the amount of land sold to the Association is insufficient to eliminate an appearance of preference for religion by the city.

A. The Method of Sale

Paulson argues that the city's sale of the half acre parcel under the cross to the Association demonstrated an unconstitutional preference and aid to the Christian religion. Despite the fact that the most recent sale was conducted in a publicized and open bidding process, Paulson maintains that the city structured the process to give the Association an advantage by requiring maintenance of a war memorial on the property and considering the bidders' experience in maintaining a war memorial. Paulson further argues that it was improper for the city to retain complete discretion to accept or reject any bid for any reason.

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[6] The full statement in the opinion is as follows:

> This court has never had occasion to definitively construe the no preference clause of article I, section 4 and we need not do so here. In guaranteeing free exercise of religion "without discrimination or preference," the plain language of the clause suggests, however, that the intent is to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the state neither favor nor discriminate against religion. Having concluded above that an exemption from a landmark preservation law satisfies all prongs of the Lemon test, it follows that the exemption is neither a governmental preference for or discrimination against religion.

East Bay, 24 Cal.4th at 719.

The city's invitation for purchase proposals solicited nonprofit corporations interested in purchasing approximately one-half acre of property in the Mount Soledad Natural Park for the purpose of maintaining an historic war memorial. The invitation stated that the city was neither requiring nor precluding the retention of the cross. The invitation requested that proposals include a detailed outline for the maintenance of an historic war memorial.[7]

As the district court noted, the bidding process was open and publicized. The city received 42 requests for copies of the invitation and five serious proposals. The proposals were submitted by Horizon Christian Fellowship, the National League for the Separation of Church and State, Saint Vincent De Paul Management, Freedom From Religion Foundation, and the Association. The city established a committee and evaluation criteria. Of the five bids received, the Association's bid price of $106,000 was the highest.

Paulson does not challenge the continued use of the site as a war memorial. Rather, he argues that this use restriction favored the Association in the bidding process. The open and

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[7] Paulson faults this use restriction as having been authorized by the voters in 1992 in order to preserve the cross. This argument, however, digresses from the true issue of concern here which is how the most recent sale was actually conducted. Even an observer who is aware of the cross's history on Mount Soledad would recognize that the procedurally neutral sale offered a possibility that a private buyer would remove rather than retain the cross. These circumstances of a procedurally neutral sale to a private organization differ significantly from those in *Hewitt* which involved continuous county ownership of a park exclusively containing immovable biblical figures and statues of scenes from the New Testament. During the vast majority of the county's ownership of "Desert Christ Park," the park was allowed to appear as an extension of the nearby church, and brochures for the park contained citations to passages in the Bible. *Hewitt*, 940 F.2d at 1569. Paulson's reliance on *Hewitt* is misplaced. There, the county merely attempted to re-characterize the park, rather than divest itself of the religious message with an open sale to a private organization.

public bidding process, which could have resulted in a sale of the property to someone who would have removed the cross, makes a strong showing of the government's lack of preference of religion in imposing the use restriction. Imposing the use restriction here that requires that the property be used as it has in the past as a war memorial does not conflict with the Establishment Clause. *See Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (en banc) (upholding use restriction that public property containing statue of Christ sold to private organization be maintained as a public park).

Paulson also contends that the consideration of the bidders' experience in maintaining a war memorial was improper. Our recognition of this use restriction as legitimate compels our conclusion that the consideration of a bidder's qualifications for maintaining a war memorial is not only logical and reasonable, but indeed prudent considering the intended and required function of the property.

Here, the city's sale of the property to the highest bidder did not constitute a preference in evaluation of the bids. *See Woodland Hills Homeowners Org. v. Los Angeles Cmty. Coll. Dist.*, 218 Cal. App. 3d 79, 95 (1990). The evidence establishes that religious and secular groups had equal opportunity to purchase the land. Furthermore, a sale of real property generally is an effective way for a public body to end its inappropriate endorsement of religion. *See Freedom From Religion Foundation*, 203 F.3d at 491 (upholding closed sale to private organization because it complied with state laws and the city received fair market value for the land).

Paulson also challenges the provision of the invitation to bid stating that the city was not obligated to accept any proposal or to negotiate with any proposer and that the city council reserved the right to reject any or all proposals without

cause or liability. The district court noted that all invitations for bids sent out by the city for any project contain this same language for liability reasons. Paulson argues that retaining such "unfettered" discretion leaves open the possibility of unconstitutional discrimination by the city. He relies on *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (en banc).

In *American Jewish Congress*, we held that the city of Beverly Hills' ad hoc permitting system lent itself to abuse such that the city's decision to allow the erection of a menorah in a public park violated the Establishment Clauses of the California and Federal Constitutions. The permitting process in *American Jewish Congress* involved a general rule forbidding the erection of large unattended displays on public property but vested standardless discretion in its officials to grant exceptions to the rule. *Id.* at 383. There were no guidelines as to when an exception could be made, applicants were not informed of what requirements they had to meet to erect a display and sometimes application forms were not even used. *Id.* at 384. Moreover, it was not even clear where the decision making authority was vested. *Id.* Such truly absolute discretion without any standards is clearly distinguished from the city council's discretion here.

Paulson does not dispute that this discretion is retained in all bid invitations to avoid liability. Indeed, the city has explained that the invitation to bid was prepared, evaluated, and awarded according to well-established, written city procedures which mandate the inclusion of a provision permitting the city to reject any bid.

The bidding process was structured with explicit factors considered consistently for every bid. The structure of this process did not leave unfettered discretion to the city council and the result of the process here is consistent with the evaluated factors: the Association submitted the highest bid, a

detailed proposal to create and maintain a war memorial, and had extensive experience in maintaining such a memorial. Paulson does not contend that the city used its discretion improperly here, but even if he did, the express factors considered provide a reviewable decision unlike the standardless decision in *American Jewish Congress*. Thus, the discretion retained by the city council here does not violate the State or Federal Constitution.

The analytical framework developed in *Lemon* provides three factors to be examined to assess whether governmental conduct is constitutionally forbidden under the Establishment Clause: (1) that there is a secular purpose; (2) that the principal or primary effect neither advances nor inhibits religion; and, (3) that an excessive government entanglement with religion is not fostered. *Lemon*, 403 U.S. at 612-13. California has also applied this test to analyze alleged violations of its own constitution's religion clauses. *See East Bay*, 102 Cal. Rptr.2d 280 (2000).

Applying the first prong here, the sale had the clearly secular purpose of ending an inappropriate endorsement of religion by transferring the land to a private entity which could retain or remove the cross in its own discretion. As discussed above, the bidding process and the ultimate sale neither preferred or discriminated against religion and, thus, the challenged conduct satisfies the second prong of *Lemon*. Finally, to determine if the state is impermissibly entangled with religious activity under *Lemon*'s third prong, we consider "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615.

Here, religious institutions did not necessarily benefit from the sale as they were merely provided the same opportunity as

other members of the public in an open bidding process. The state provided no aid as it sought the highest bidder with the best qualifications under the enumerated factors. The only "resulting relationship" from the bidding process is that which existed during the short time that the actual transfer took place. That brief "relationship" which would have necessarily resulted with any sale, did not impermissibly entangle the government with religious activity. We conclude therefore, that the bidding process and the sale itself do not run afoul of the Establishment Clause of the First Amendment or the California Constitution. Having satisfied all prongs of the *Lemon* test, it also follows that the challenged acts were neither governmental preference for or discrimination against religion. *See East Bay*, 102 Cal.4th at 710.

Paulson also argues that the resulting transfer of ownership fails the *Lemon* test. The Supreme Court has applied *Lemon* or some variation thereof to cases involving religious displays ongovernment property. *See Allegheny*, 492 U.S. at 592 (applying Lemon to case involving creche and menorah on government property); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (applying Lemon to case involving government owned creche). However, this case does not involve a religious symbol that will be maintained on public property, but rather a religious symbol on private property that was sold by the city. The issue on the transfer is the constitutionality of the sale to the private party, which as discussed above, satisfies *Lemon*. With the completion of the valid sale, the land became private property to which *Lemon* does not apply.

Because the land was sold in an open bidding process, with its express provision that the purchaser's intent to keep or remove the cross from the property would not be considered in evaluating bids, any appearance of preference for religion is dispelled. While this neutral transaction does sit in the shadow of the city's previous apparent endorsement to save the cross,

under the open bidding process, the fact that someone could have bought the property and removed the cross neutralizes this history. Addressing this under the wording of the California Constitution, this process was not structured to "prefer" religion, and the process had sufficient procedural safeguards to not appear to a reasonable observer that the city had allied itself with religion. *See generally Sands*, 53 Cal. 3d at 876.

B. The Location of the Cross & Its Proximity to the Public Park

Paulson contends that selling one half acre of land on which the cross is located does not cure the constitutional infirmity because it is still visable from some areas of the remaining public park land. As the district court noted, this is a 170 acre park most of which is rugged undeveloped open space with some trails and the cross is not even visible from many places within this undeveloped portion of the park. As the district court also noted, it appears that the amount of land sold to the Association includes all the land up to the public sidewalk that encircles the cross. Outside the public sidewalk, there is a circular public driveway, a public parking area and some cleared public land outside the driveway including an area of grass with benches and a water fountain. The cross is visible from the parking area and cleared portions of the park. The important consideration for this cleared area is whether the distinction between the public and private area is clearly marked.

In determining whether a reasonable observer would view the presence of the cross as a governmental preference for religion, the district court considered the Association's preparation of design and construction plans to develop the site as a war memorial. These plans involve erecting twenty-six concrete bollards, one every twenty feet, surrounding the memorial site. Between each bollard will be a plaque stating

"Mount Soledad Veterans' Memorial Private Property." The Association also intends to install additional signs for the publicly owned portion of the park to further identify the memorial site as private property.

This enhanced demarcation of the site as private property rectifies any potential appearance of preference for religion. While it is conceivable that an observer from a significant distance could mistake the cross as being part of the public park, once that person reached the memorial site they would quickly recognize that the cross sits on private property. Additionally, the fact that this land is private both by its sale and designation, triggers protection of the Association's constitutional rights of Free Exercise and Free Speech. Requiring the removal of the cross from private property would infringe upon the Association's fundamental constitutional rights.

C. Establishment Clause, Free Exercise and Free Speech

There is a crucial distinction between government speech endorsing religion, which the Establishment Clause prohibits, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995). The distinction disappears when private speech can be mistaken for that of the government. *Id.* at 766. When such a mistake renders private speech attributable to the government is not clear. In *Pinette*, a plurality warned that it would have "radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may--even reasonably--confuse an incidental benefit to religion with state endorsement." *Id.* at 768. The Supreme Court held that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on the grounds of the state capitol. Three Justices concurred in the judgment, noting that

their vote to affirm was in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government endorsement of it. *Id.* at 784, 115 S.Ct. 2440.

Assuming without deciding that *Pinette* even applies to a religious display on private property, the disclaimers and demarcations that the Association has installed and planned clearly designate the land and the cross as private property, which alleviates the concerns of government endorsement raised in *Pinette*. *See id.* at 766 (involving the presence of a cross on public property). This case even more clearly invokes the Association's constitutional rights of free exercise and free speech because they have validly purchased the land.

The Seventh Circuit recently addressed a more factually analogous situation and, following the analysis in *Pinette*, analyzed whether a reasonable person would perceive government endorsement of religion. *Freedom From Religion Foundation*, 203 F.3d at 496. The Seventh Circuit held the presence of a statue of Christ in a city park to be unconstitutional, even after upholding the city's sale of .15 acre of land containing the statue to a private memorial fund. There, the private land had no visual boundaries that would inform the reasonable observer that the statue sat on private property. *Id.* at 494. The Seventh Circuit suggested that a fence to separate the public from private property and a clearly visible disclaimer would effectively remedy the appearance of government endorsement. *Id.* at 497. *See Freedom From Religion Foundation v. City of Marshfield*, 2000 WL 767376 (W.D. Wis. May 9, 2000) (Mem.) (finding upon remand that a ten foot wall around the statue is more than what is reasonably necessary to remedy the Establishment Clause violation). Thus, the facts relevant to the issue of continuing endorsement of religion here differ in a crucial way from *Freedom From Religion Foundation* because the Association plans to construct clearly visible boundaries around the private land, to display

disclaimers, and has worked diligently on its promised improvements for the memorial.

With such clear demarcations between the surrounding public property and the private property on which the cross sits, a reasonable observer would not conclude that the government endorsed the presence of the cross. Moreover, we decline to adopt a rule that would infringe upon private property owners' constitutional rights to display religious symbols on their land simply because their land sits next to publicly owned land or was formerly on public land. The fact that some hypothetical observer viewing the cross from afar could conceivably confuse its presence to be on public land, does not justify forcing a private landowner to sacrifice its own constitutional rights. We follow the Supreme Court's admonition that too broad a reading of the Establishment Clause would have "radical implications for our public policy." *Pinette*, 515 U.S. at 768, 115 S.Ct. 2440.

III. CONCLUSION

The half-acre parcel of land underneath the cross was sold to a private party in an open and publicized neutral bidding process. Sufficient demarcations make it clear that the cross sits on private property. Accordingly, we conclude that the presence of the cross on this private property does not violate the California or United States Constitution. Furthermore, because the land was legitimately sold to the private Association, we must recognize and protect the Association's rights of Free Exercise and Free Speech as the Constitution demands no less. For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civ. No. 89-0820GT(LSP)

PHILIP K. PAULSON, *et al.*,

Plaintiffs,

v.

THE CITY OF SAN DIEGO,

Defendant.

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT CALIFORNIA

ORDER

On December 6, 1999, Plaintiffs brought another Motion to Enforce the Injunction ("Motion") against the presence of the Latin cross on publicly maintained park land, specifically atop Mount Soledad ("Mt. Soledad"). This Motion raises the same issues as the previous Motion to Enforce injunction: 1) Whether the actual sale of the land passes constitutional muster, and 2) Whether the size of the plot sold under the cross is large enough to cure the constitutionally impermissible appearance of preference by the City of San Diego ("City"). For the reasons stated below, the Court finds, with one added condition, that both method of sale of the land beneath the Mt. Soledad cross and the amount of land sold, provided the land is improved as proposed, cures the original constitutional infirmities. Accordingly, the Court finds that the City has

substantially complied with the requirements of the injunction and the Motion is **DENIED as Moot** once the City and the Mt. Soledad Ass 'n comply with the one condition outlined below.

BACKGROUND

In December of 1991, this Court ruled that the presence of the Latin cross atop Mt. Soledad Park violated the No Preference Clause of the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991), *aff 'd.* 990 F. 2d 1518 (9th Cir. 1993), *cert. denied* 114 S. Ct. 2707 (1994). The Court issued a permanent injunction forbidding the permanent presence of the Mt. Soledad cross on land publicly owned by the City. In response to the injunction, the City sold approximately 222 square feet under the cross to the Mt. Soledad Memorial Association ("Mt. Soledad Ass'n") in a negotiated sale for $26,000.00. At that time, the City neither solicited nor considered any bids or offers from other prospective buyers of the land under the Mt. Soledad cross. Furthermore, the Mt. Soledad Ass'n clearly stated its intention to keep the Mt. Soledad Cross as part of its proposed war memorial.

In September of 1997, this Court ruled that both the method of sale of the land under the Mt. Soledad cross to the Mt. Soledad Ass'n and the amount of land sold to it failed to remedy the original constitutional infirmities. Specifically, since the City sold the land to the Mt. Soledad Ass'n in a private, negotiated sale, without considering any other offers or bids, the sale gave the appearance that the City was preferring the Christian religion by trying to "save" the Mt. Soledad cross. Also, the City only sold a tiny "postage stamp" plot of land directly under the cross. The remaining developed land surrounding the cross was still owned and maintained by the City. Few people visiting the Mt. Soledad cross would be aware that it was not publicly owned and maintained by the City.

Hence, the Court ruled that the City still had not complied with the terms of the injunction.

In July of 1998, in response to this Court's order, the City sold .509 of an acre of land (approximately 22,172 square feet) underneath the Mt. Soledad cross. This time the City sold the land through a well publicized and open bidding process. The land was sold to the Mt. Soledad Ass'n for $106,000.00, which was the highest bid.

Plaintiffs and the ACLU now argue that this current sale by the City to the Mt. Soledad Ass'n still does not cure the constitutional infirmities addressed in the original injunction and indeed still violates the both the California and United States Constitutions. Specifically, Plaintiffs argue that the City so structured the bidding process as to favor only the Mt. Soledad Memorial Ass'n. Additionally, Plaintiffs argue that the City retained absolute discretion to accept or reject any bid. This, according to Plaintiffs, also tipped the scales in the favor of Mt. Soledad. They argue this tainted the bidding process and did "nothing to dissociate the City's unconstitutional appearance of preference" of religion because the City was still trying to "save" the Mt. Soledad cross. Furthermore, Plaintiffs contend that the City sold too small a parcel of land to the Mt. Soledad Ass'n to alleviate any appearance of preference or aid to religion by the City.

CONCLUSIONS OF LAW

A. Constitutional Law

As a preliminary matter, Plaintiffs raise both federal and state constitutional claims. It is well settled that federal constitutional issues should be avoided if the case can be decided on state law grounds. *See Carreras v. City of Anaheim*, 768 F. 2d 1039, 1042-43 (9th Cir. 1985). "Where state provisions offer more expansive protection that the federal

constitution, [the Court] must address the state constitutional claims in order to avoid unnecessary consideration of the federal constitutional claims." *Vernon v. City of Los Angeles*, 27 F. 3d 1385, 1392 (9th Cir. 1994). It is undisputed in this case that the No Preference Clause of the California Constitution is broader in scope and more protective than the Establishment Clause of the United States Constitution. Hence, this Court relies on the California Constitution to decide this case.

The California Constitution contains several provisions which mandate a separation between church and state. The first provision is article I, section 4, which is very similar to the language in the federal constitution. Section 4 states in pertinent part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.

Cal. Const. Art. 1,§ 4. California courts have consistently held that this "no preference" clause not only prohibits a governmental body from preferring one religion over another, but requires that the governmental body's actions may not even *appear* preferential. *Hewitt*, 940 F. 2d at 1657. Furthermore, in his concurring opinion in *Sands v. Morongo Unified School Dist.* 53 Cal. 3d 863, (1991), Judge Mosk describes the prohibition against religious preference this way:

> The preference clause seeks to prevent government from giving *any* advantage to religion in California. The relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state.

Sands, 53 Cal. 3d at 911-912 (emphasis added).

The second provision is article XVI, section 5 which "strictly prohibits any governmental support for religious purposes." *Id.* Section 5 states, in pertinent part:

> Neither the Legislature, nor any county, city and county, . . . or other municipal corporation, shall ever make an appropriation, . . . or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help support or sustain any school, . . . or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of real property or real estate ever be made by the state, or any city, city and county, town or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . .

Cal. Const. Art. XVI, § 5.

The California courts have held that this section "admits of no de minimis exception. . . . The ban is on aid to religion in *any* form." *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal. App. 3d 79, 93 (1990) *quoting Fox v. City of Los Angeles*, 22 Cal. 3d 792, 806 (1978). Accordingly, this section prohibits not only monetary aid to religion, but *any* official involvement that promotes religion. *California Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 605, fn. 12 (1974). The Ninth Circuit has stated that these and other provisions of the California Constitution are "'proof of the framers' intent to build a Jeffersonian wall of separation between church and state.'" *Hewitt*, 940 F. 2d at 1566, *quoting Sands*, 53 Cal. 3d 863 (1991). With this concept of a "Jeffersonian wall of separation between church and state" in mind, the Court reviews the current sale and the amount of land sold to the Mt. Soledad Ass'n.

A. Method Sale

After this Court's ruling in September of 1997, the City once again has sold the land underneath the Mt. Soledad cross to the Mt. Soledad Assn'n. but this time through a public and open bidding process. In June of 1998, the City sent out a press release, which was also posted on the City Attorney's website, inviting purchase proposals for the Mt. Soledad site. The introduction of the Invitation is as follows:

> The City of San Diego is inviting proposals from private non-profit corporations interested in purchasing approximately one-half acre of property in the Mt. Soledad Natural Park for the purpose of maintaining an historic war memorial. The property is presently the site of a large, concrete, Latin cross. *The City is neither requiring, nor precluding the retention or maintenance of a cross in its invitation for proposals.* (Emphasis added.)

Additionally, in the *Background Section* of the Invitation it states that "[p]roposals to purchase the property will be evaluated without regard to whether or not the organization submitting the proposal plans to maintain a cross on the site." Finally, in the *Proposal Analysis And Selection* section, under the proposed use the Invitation states "without regard to whether or not such proposal includes retention or maintenance of a cross." In addition to publicity from the local newspapers, the City's Invitation was run as a legal classified advertisement for five days in the San Diego Union-Tribune and once in each of the two weekly newspapers. (Decl. Christian Anderson and Exhibit B attached thereto).

The City received and responded to 42 requests for copies of the Invitation. The requests were received from six states: California, Illinois, Minnesota, Oregon, Texas, and Wisconsin. (Decl. Christian Anderson and Exhibit C attached thereto).

In July of 1998, five serious proposals were submitted to the City for evaluation by a committee of three City department heads. Two of the proposals were from atheist groups, two were from church groups and the fifth was from the Mt. Soledad Ass'n.

William T. Griffith ("Mr. Griffith"), the Director of Real Estate Assets Department for the City of San Diego was one of the three department heads selected to evaluate the proposals. In his declaration he describes the evaluation process. (Decl. Wm. Griffith, p. 1). He states that the three department heads met twice. (Decl. Wm. Griffith, p. 1). At the first meeting they each received copies of the five proposals and blank forms listing the five criteria used for evaluations. (Decl. Wm. Griffith, p. 1). Mr. Griffith states in his declaration that it "was openly discussed and clearly understood by the committee members that the retention or removal of the cross was not a factor to be considered in [the] evaluation of the proposals." (Decl. Wm. Griffith p. 1). At the second meeting the evaluations of the proposals were compared and discussed. (Decl. Wm. Griffith, p. 2). The committee's evaluation notes are attached as exhibits to Mr. Griffith's declaration. It was a unanimous decision of the committee to recommend to the City Council to accept the proposal of the Mt. Soledad Assn'n, which was the highest bidder[1]. (Decl. Wm. Griffith, p. 2)

On September 8, 1998, after a public hearing which included a presentation by the evaluation committee and public comment, the City Council accepted the recommendation of the committee and authorized the City Manager to sell the parcel

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[1] Although St. Vincent de Paul Management bid $50,000.00 – or $5,000.00 more that the highest bidder. The committee treated this as a bid for $50,000.00. Mr. Griffith states that permitting a bid computed by reference to another bid "would render the bidding process meaningless." (Decl. Wm. Griffith, p. 2)

of land to the Mt. Soledad Ass 'n, the highest bidder. Since the sale of the land to the Mt. Soledad Ass'n, all requests to the City for the use of the property are referred to the Mt. Soledad Ass'n. (Decl. Dianne Brittingham). Furthermore, it is explained to the requesting party that the land is now privately owned by the Mt. Soledad Ass'n. (Decl. Dianne Brittingham).

Although Plaintiffs argue that the bidding process and sale were so structured as to prefer the Mt. Soledad Ass'n, the evidence belies this contention. The City sent out a very well publicized invitation for bids on the Mt. Soledad Property. Forty-two entities requested copies of the Invitation, with five serious proposals. The City also established a committee and neutral criteria for the evaluation of the bids it did receive, specifically stating that retention of the cross was *not* a factor to be considered in the evaluation process. In the end, the Mt. Soledad Ass'n was recommended to the City Council because it was the highest bidder. Plaintiffs argue that since the City retained the right to accept or reject any bid, this is evidence of preference for the Mt. Soledad Ass'n. However, all invitations for bids sent out by the City contain this same language for liability reasons. Hence, as far as the Court is concerned, the method of sale, through this open and apparently neutral bidding process did not favor the Mt. Soledad Ass'n and did not violate the California Constitution's prohibition against the preference of religion. Accordingly, the Court finds that the City has complied with the Injunction with respect to the method of sale of the land underneath the Mt. Soledad cross.

B. Amount of Land Sold

Plaintiffs next argue that the half acre of land sold underneath the Mt. Soledad cross does not cure the constitutional infirmity of preference for the Christian religion by the City. According to the Plaintiffs, because the Mt. Soledad cross is still visible from some areas of the remaining

public parkland, this violates the California Constitution. This Court disagrees.

As stated above. In July of 1998, the City sold approximately .509 of an acre of land to the Mt. Soledad Ass'n, the highest bidder. From the drawing submitted by James Alcorn and Associates, Architects AIA ("Alcorn Assoc."), it appears that the amount of land sold to the Mt. Soledad Ass'n includes all the land up to the public sidewalk that encircles the Mt. Soledad cross. Outside the public sidewalk, there is a circular public driveway, a public parking area and a small amount cleared public land outside the circular driveway (acreage unknown). Other than being cleared of brush, this open land is undeveloped in any way. The Mt. Soledad cross is visible from the parking area and cleared portions of the park. The rest of the 170 acres of parkland is undeveloped, rugged open space, requiring no maintenance. (Declaration Andrew Guyer, p. 1). Much of this undeveloped parkland is too rugged to be used by the public. Additionally, the Mt. Soledad cross is not even visible from most places within this undeveloped portion of the park. (See aerial photo and land photos submitted by Richard Johnson). Other than the public sidewalk, parking and road, it is the Court's view that the City has sold substantially all the developed land under and surrounding the Mt. Soledad cross.

Moreover, since it purchased the land in 1998, the Mt. Soledad Ass'n has requested the preparation of design and construction plans to develop the Mt. Soledad site as a war memorial site. The Mt. Soledad Ass'n hired the Alcorn Assoc. to develop these design and construction plans. As part of these proposed improvements, the Mt. Soledad Ass'n plans to build twenty-six concrete bollards, every twenty feet, that will surround the memorial site. (Alcorn Decl. p. 3). These bollards "will subtly, but unmistakably, identify the transition from the public sidewalk to the private memorial site." (Alcorn Decl. p.

3). Additionally, between each bollard will be a plaque stating "Mount Soledad Veterans Memorial-Private Property." (Alcorn Decl. p. 3). Alcorn Assoc. also intends to design new signs for the publicly owned portion of the park "to correct existing misleading signs" and "further identify the Memorial site as private property." (Alcorn Decl. p. 4)

There are also design plans to construct a memorial wall which will have "individual memorial plaques honoring individual veterans." (Alcorn Decl. p. 3). Each plaque may have the picture of the honoree, a description of the honoree's experience, a personal message, and a symbol or emblem. (Alcorn Decl. p. 3). The choice of emblems includes symbols of many different types of religion and religious backgrounds. (Alcorn Decl. p. 3).

In short, the City has divested itself of the ownership of the land directly underneath and around the Mt. Soledad cross up to a surrounding public sidewalk. Although the remaining 170 acres parkland is public property, most of this parkland is very rugged open space and unusable. Additionally, the Mt. Soledad Ass'n has prepared design and construction plans to further develop the Mt. Soledad site as a privately owned and maintained war memorial. But most importantly, these plans include an enhanced demarcation of the Mt. Soledad site as private property. Accordingly, the Court finds that the amount of land sold, with the proposed improvements, is sufficient to eliminate the appearance of preference of religion by the City.

However, the Court has one concern that must be corrected before this Court finally rules that the Motion to Enforce Injunction is moot. It appears from the declaration of Mr. Peter Irons that the City still pays for both the water and electricity for the Mt. Soledad war memorial site. The Court holds that the Mt. Soledad Ass'n must be responsible and pay for any and all maintenance and utilities for the privately owned portion of the

Mt. Soledad site. This would require the installation of separate meters for both the private and public portions of the land.

C. Conclusion

In conclusion, the Court finds that the method of sale of the land comports with the requirements of the No Preference Clause under the California Constitution. Additionally, the Court finds that the amount of land sold, along with the proposed improvements, divests the City of any appearance of preference of religion, provided that any and all utilities and maintenance for the private portion of Mt. Soledad are the sole responsibility of the Mt. Soledad Ass'n. Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Enforce Injunction is **DENIED as Moot** with one condition that any and all utilities and maintenance for the private portion of the park are the sole responsibility of the Mt. Soledad Ass'n.

IT IS FURTHER ORDERED that the City and/or Mt. Soledad Ass'n provide proof to the Court that they have complied with the above mentioned condition within sixty days.

IT IS SO ORDERED.

Feb 3, 2000 /s/ Gordon Thompson Jr.
date GORDON THOMPSON, JR.

cc: All counsel and parties without counsel

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civ. No. 90-134 GT

John Murphy,

Plaintiff,

v.

Brian Bilbray, et al.,

Defendants.

Civ. No. 89-820 GT

Philip K. Paulson, et al.,

Plaintiffs,

v.

The City of San Diego,

Defendant.

FILED
SEP 18 1997
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT CALIFORNIA

ORDER

Before the Court are Motions to Enforce Injunction which forbids "the permanent presence of each cross on public property. . .where it currently appears." *Murphy v. Bilbray,* 782 F.Supp. 1420, 1438 (S.D.Cal. 1991)), *aff'd*, 990 F.2d 1518 (9th

Cir. 1993), *cert. denied,* 114 S. Ct. 2707 (1994). The Court has fully considered this matter, including a review of the numerous briefs filed, the authorities cited therein, and the arguments and exhibits presented.

A. Mt. Helix Cross

In 1990, plaintiff John Murphy filed suit against the County of San Diego challenging the presence of a thirty-six foot high Latin cross at the center of a public park atop Mt. Helix. Plaintiff alleged that the cross violated article I, section 4, of the California Constitution and the Establishment Clause of the United States Constitution.

On December 3, 1991, this Court held that the Mt. Helix cross violated the No Preference Clause of the California Constitution and issued a "permanent injunction forbidding the permanent presence of each cross on the public property...where it currently appears." *Murphy v. Bilbray,* 782 at 1438. Additionally, the Court stated that '[w]ere the parcels of land atop which Mt. Helix and Mt. Soledad crosses presently stand privately owned, then these cases would be entirely different." *Id.*

While these cases were on appeal before the Ninth Circuit, San Diego County purportedly transferred the Mt. Helix cross and a fifteen foot circle of land underneath the cross to the San Diego Historical Society ("Historical Society"). Plaintiff argues that this transfer of the cross and the land beneath it "was a sham" and urges the Court to enforce its injunction by ordering the County to either "(a) physically remove the cross or (b) sell the entire park to the highest bidder, without restriction regarding the preservation of any religious symbol upon the land." As Judge Beezer's concurring opinion points out, the "[d]estruction of the crosses, however, raises as many issues as it resolves." *Ellis v. City of La Mesa,* 990 F.2d 1518, 1529 (9th Cir. 1993) (specially concurring, Beezer, J.), *cert. denied,* 114

S. Ct. 2707 (1994). Likewise, the sale of either part or all of the parks raises the same troublesome issues.

Judge Beezer's concurring opinion raised several questions that need to be addressed before the injunction can be enforced. The foremost question is whether "the County validly took title of the land in the first place." *Id.* Other issues include "whether a trust exists, who are the interested parties under that trust, the existence and effect of the reversionary clause, and what effect the County's transfer has on the trust." *Id.* at 1530. This Court ordered the parties, including the recently joined Historical Society, to fully brief these various issues on California trust and property law, including the remedy of appointing a private trustee to prevent the trust from failing.

1. Whether the 1929 Transfer Created a Charitable Trust or Fee Simple

The initial question is what type of conveyance was created by the 1929 Deed of Conveyance ("Deed") from Cyrus Yawkey to the County. Plaintiff argues that the "indenture creates a charitable trust." (Plaintiff's Mem. Supp. Motion Enf. Inj. at 21.) The County asserts that it "validly took title to the real property in fee simple." (County's Supp. Brief at 1.) The Historical Society "concludes that it is a close question whether a charitable trust or a fee simple interest" was created by the 1929 deed. (Historical Society's Resp. at 6.)

a. Creation of a Charitable Trust

A charitable trust is created in the same manner as a private trust. *In re Estate of Heil,* 210 Cal.App. 3d 1503, 1510 (1989). To create a trust there must be trust intent, trust property, trust purpose and a beneficiary. *Walton v. City of Red Bluff,* 2 Cal.App. 4th 117, 124 (1991). To create a charitable trust, the trust purpose must be charitable in nature and the beneficiary is "either the whole or an unascertainable part of the

community." *In re Estate of Breeden,* 208 Cal.App. 3d 981, 985 (1989). Charitable purposes include: "(a) a relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community." *Id. citing* Restatement (Second) of Trusts, § 368.

Charitable trusts are favored and will be upheld if the indenture "can possibly be construed as valid by applying liberal rules of construction designed to accomplish the intent of the trustor or testator." *Breeden,* 208 Cal.App. 3d at 985. Accordingly, "courts look with favor upon attempted charitable bequests, endeavoring to effectuate them whenever possible so as to avoid intestacy." *Breeden,* 208 Cal.App. 3d at 987. Hence, where doubtful, the trust will "be construed as charitable." *Id.*

It is clear that Cyrus Yawkey intended to create a charitable trust with the 1929 indenture. First, the Deed designates Cyrus Yawkey as the Trustor and the County as the "Trustee for carrying into effect the trusts" described in the Deed. (Deed at 1.) Second, the Deed specifically provides for a charitable purpose in that the real property was improved "to render it suitable for eleemosynary, religious, educational and public uses and purposes." (Id.) Additionally, the Deed states that the property is dedicated

> to the use, enjoyment and inspiration of All People, and desires the same inure forever to the use of the Public in general and of the Citizens and residents of the County of San Diego and the State of California in particular, to be by them used . . . for such benevolent, religious, educational and charitable purposes as will contribute to promote knowledge and culture, to relieve the distressed in body mind and/or spirit, to cultivate a love for the beautiful in art and nature, to

> foster an interest and love in music and the drama, and to promote all things which tend to elevate and refine mankind. (Deed at 2.)

Third, under the terms of the Deed, annual Easter sunrise services are to be held and the cross illuminated on certain specified dates, including Christmas Eve, the night before Easter, and the night before Thanksgiving. Finally, the Deed sets aside a sum of $30,000, held in bonds, for the maintenance and upkeep of the real property and the cross. Accordingly, the Deed clearly evinces the requisite charitable intent, purpose and beneficiary.

However, the Deed also contains reversionary language which complicates the analysis. Generally, the presence of reversionary language indicates the creation of a fee grant and not a charitable trust.

b. Reversionary Language in the Indenture

The County, relying on *Walton,* 2 Cal. App. 4th 117, asserts that the presence of reversionary language in the indenture is inconsistent with the intent to create a charitable trust. In *Walton,* Mrs. Elizabeth Kraft and her son granted, by inter vivos transfer in the early 1900's, certain properties to the City of Red Bluff for the specific purpose of being used for a library. *Walton,* 2 Cal. App. 4th at 120. In 1986 the books were removed from the library. On appeal, Walton, an heir, argued that the land was transferred by a trust instrument and that the land reverted to him because the trust terms were violated. *Id.* On cross appeal, the City of Red Bluff argued that the land was transferred in fee simple on a condition subsequent. *Id.*

The California Court of Appeals held that the language of the indenture was the language of a fee grant not a trust. *Walton,* 2 Cal. App. 4th at 125. Specifically, the indenture stated "the grant and conveyance herein made shall cease and

terminate, and title to the said property . . . shall at once revert to the party of the first part or to her heirs or assigns." *Id.* Citing cases from other jurisdictions, the California Court of Appeals decided that based on the facts before it, the presence of the reversionary language in the grant was inconsistent with the intent to create a charitable trust. *Id.* Furthermore, the court held that the use of the word "trust" in the indenture was "precatory, intended to convey to the recipient of the solemnity of the grant." *Id.*

The 1929 indenture undeniably contains reversionary language. The Deed states that should the trustee convey or attempt to convey the property or merge or attempt to merge the funds or use the property or funds other than as specified in the Deed,

> then and in that event, the said premises, . . . and said fund. . ., shall forthwith revert to, and the title thereof and thereto vest in, and the whole thereof become the property of the trustor herein, his heirs and assigns, and the heirs and assigns of said MARY YAWKEY WHITE. (Deed at 8.)

Furthermore, the Deed provides that "all instructions and requirements in this Indenture contained shall be construed as mandatory." (*Id.*)

c. The Indenture Created a Charitable Trust

This Court is left with determining whether the 1929 indenture created a charitable trust or some type of fee simple. As the Historical Society suggests, this is a close question because of the presence of conflicting language within the indenture. On the one hand, it is quite clear to the Court that Cyrus Yawkey intended to create a charitable trust. On the other hand, there is the presence of the reversionary language which may indicate the intent to create some type of fee simple.

For the reasons stated below, the Court finds that the 1929 indenture created a charitable trust.

In construing an indenture, the intent of the grantor is of paramount importance. *City of Manhattan Beach v. Superior Court,* 13 Cal. 4th 232, 238 (1996). "In general, a grant of real property is interpreted in like manner as a contract." *Id.; Machado v. Southern Pacific Transp. Co.,* 233 Cal.App.3d 347, 352-53 (1991). More importantly, "[t]he cardinal requirement in the construction of deeds and other contracts is that the intention of the parties as gathered from the four corners of the instrument govern." *Id.* The task of the reviewing court is to ascertain the intent of the parties at the time of the grant. *Id.* If there is some ambiguity in the deed, the court may interpret that grant in accordance with the rules of construction set forth in the California Civil Code. *Id.* For example, if the language of the deed is ambiguous, then the court may rely upon recitals in the deed (Civ. Code 1068); a grant is to be interpreted in favor of the grantee, but a reservation in a grant is interpreted in favor of the grantor (Civ. Code, § 1069); and most importantly for this case, if parts of the grant are absolutely irreconcilable, then the former of the irreconcilable parts prevails (Civ. Code, § 1070). *Id.* Finally, it is the general rule that if the terms of the deed are indefinite, the court may look to the conduct of the parties to ascertain the intent of the parties. *See City of Manhattan Beach,* 13 Cal.App. 4th at 246.

From reviewing the 1929 indenture, it is clear to this Court that Cyrus Yawkey's dominant intent was to create a charitable trust. First, the actual title of the deed states that it is "CONVEYING MT. HELIX NATURE THEATRE . . .TO THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AND ESTABLISHING AN ENDOWMENT FUND FOR THE *PERPETUAL* MAINTENANCE AND BETTERMENT THEREOF." (Deed at 1.) (emphasis added). The title of the deed indicates that Cyrus Yawkey intended the Mt. Helix

Nature Park to last in perpetuity. Second, the very next paragraph of the deed states that Cyrus Yawkey, as Trustor, and his deceased sister improved the Mt. Helix property for the purpose of "render[ing] it suitable for eleemosynary, religious, education and public uses and purposes and dedicated it as a Memorial to their Mother, Mary Carpenter Yawkey." (Id.) These words clearly indicate Cyrus Yawkey's intent to create a charitable trust for the benefit of the public and dedicated to his deceased mother. Furthermore, the fourth paragraph of the deed states that Cyrus Yawkey dedicated the Mt. Helix Nature Park for

> the use, enjoyment and inspiration of All People, and desires the same to *inure forever* to the use of the Public in general and of the Citizens and Residents of the County of San Diego and the State of California, to be by them used, free from any and all charges, save and excepting under the contingency hereinafter mentioned, for such benevolent, religious, educational and charitable purposes as will contribute to promote knowledge and culture, to relieve the distressed in body, mind and/or spirit, to cultivate a love for the beautiful art and nature, to foster an interest in and love of music and the drama, and to promote all things which tend to elevate and refine mankind.

(emphasis added). This fourth paragraph also indicates that Cyrus Yawkey's primary intent was to create a charitable trust of both the land and the funds to maintain the land for the benefit of the public. Third, throughout the entire deed, the words "trust," "Trustee," and "Trustor" are used, another indication that Cyrus Yawkey intend to create a charitable trust. Fifth, the deed clearly states that Cyrus Yawkey conveyed the Mt. Helix Nature Park to the County "as Trustee, for the uses and purposes, and subject to the conditions of trust in this indenture." (Deed at 2.) Finally, most of the remainder of the

deed recites various conditions for the fulfillment of the trust, such as the holding of annual Easter services, the lighting of the cross during the year, and the investment and use of the funds left in trust for the upkeep of the Mt. Helix Nature Park. It seems quite evident to this Court that Cyrus Yawkey intended to create a charitable trust of both the Mt. Helix Nature Park and the funds for the upkeep of the property.

However in contrast with the rest of the deed, the very last paragraph of the indenture contains reversionary language. This reversionary language, which generally indicates the granting of a fee simple, is not consistent nor reconcilable with the rest of the language in the indenture or Cyrus Yawkey's dominant intent to create a charitable trust. Accordingly, this Court is construing the reversionary language as emphasizing Cyrus Yawkey's intent that the Trustee use the Mt. Helix Nature Park for the benefit of the public and the park be dedicated to the memory of his mother, rather than the intent to divest the County of the property if it does not meet certain requirements of the deed. *See Walton,* 2 Cal. App. 4th at 125.

This Court's decision to construe the 1929 as an indenture is also in keeping with the law's general presumptions about charitable trusts and reversionary clauses. As a general rule, charitable trusts are favored under the law and it is the duty of the court to carry out the dominant purpose of the donor. *See Heil,* 210 Cal.App.3d at 1510; *In re Los Angeles County Pioneer,* 40 Cal.2d 852 (1953). Moreover, if a doubt exists, "a gift must be interpreted in favor of a charity." *Heil,* 210 Cal.App.3d at 1510. By contrast, a "reverter is a type of forfeiture, abhorrent to the law." *Walton,* 2 Cal.App.4th at 124 (citations omitted). "Because 'the law views reversion as an anomalous doctrine, an exception to the general aversion to forfeiture' the law requires *clear expression of the grantor's intent.*" *Id.* (emphasis added). Additionally, "with respect to a charitable trust a right of reverter in the trustor will not be

favored." *McCarthy v. Poulsen,* 173 Cal.App.3d 1212, 1218 (1985). Hence the law looks with favor upon charitable trusts and is adverse to rights of reversions, which further supports this Court's finding that the 1929 indenture created a charitable trust, not a fee simple.

Finally, all the parties to the deed have treated the conveyance of the Mt. Helix Nature Park and the bonds for its maintenance as being held in trust by the County for the benefit of the public. As far as the Court is aware, the County has continued to comply with the terms of the indenture even after the commencement of this suit. Additionally, the Yawkey heirs have not tried to record their alleged reversionary interest under the Marketable Title Act. Nor have any of the Yawkey heirs tried to either supervise or enforce the provisions of the deed. Accordingly, it appears to the Court that all parties concerned considered the indenture to be a deed of trust and the County the Trustee.

d. Conclusion

In conclusion, in reviewing the indenture it is clear that Cyrus Yawkey intended to create a charitable trust with the 1929 indenture and not a fee simple. The wording throughout all of the deed, except for the one reversionary clause at the end, indicates this intent. Also, the actions of the parties to the deed indicate the intention to create a charitable trust of the Mt. Helix Nature Park, with the County acting as Trustee. Finally, the law looks with favor on charitable trusts and looks with disfavor on reversionary clauses. For these reasons and those set out above, the Court now holds that the 1929 indenture created a charitable trust of both the real property and the bonds.

2. The Attorney General as a Necessary Party

In light of this Court's holding that the 1929 indenture created a charitable trust, the question remains as to who are necessary parties to the action. In reviewing current case law, it is apparent that the Attorney General of the State of California is a necessary party to any action that involves the disposition of assets of a charitable trust. *In re Horton's Estate,* 11 Cal.App.3d 680, 685 (1970). It is the Attorney General who has the "primary responsibility for the supervision of charitable trusts, and generally he is the proper party" to protect the interest of the public. *Hardman v. Feinstein,* 195 Cal.App. 3d 157, 161 (1987). The Attorney General is the "overseer of charities" and represents the public, which is the ultimate beneficiary of the charitable trust. *Horton's Estate,* 11 Cal.App.3d at 685; *Hardman,* 195 Cal.App.3d at 161. *See also,* Uniform Supervision of Trustees for Charitable Purposes Act, West's Ann.Gov.Code §§ 12580-12595.

The 1929 deed expressly provided that both the Mt. Helix Nature Park and the funds for its maintenance were for the benefit of the public; that the public was the ultimate beneficiary of the trust. For example, the indenture clearly states that the property was dedicated

> to the use, enjoyment and inspiration of All People, and desires the same to inure forever to the use of the Public in general and of the Citizens and Residents of the County of San Diego and the State of California in particular, to be by them used . . . for such benevolent, religious, educational and charitable purposes as will contribute to promote knowledge and culture, to relieve the distressed in body mind and/or spirit, to cultivate a love for the beautiful in art and nature, to foster an interest in and love of music and the drama,

> and to promote all things which tend to elevate and refine mankind. (Deed at 2.)

Since the general public is the ultimate beneficiary of both the Mt. Helix Nature Park and the funds for its maintenance, which were left in trust by Cyrus Yawkey, it is evident that the Attorney General of the State of California is a necessary party to this action. Accordingly, pursuant to F.R.C.P. Rule 19, the Court is ordering that the Attorney General be joined as a necessary party and be given full notice of the pending action. No further proceedings will take place until the Attorney General is joined as a necessary party to this action and apprised of the current status on this litigation.

B. Mt. Soledad Cross

This Court also found, in the same 1991 opinion, that the cross "displayed atop Mt. Soledad is subject to the same constitutional infirmities" as the cross atop Mt. Helix is subject. *Murphy v. Bilbray,* 782 F.Supp. at 1438. Similarly, this Court found that the Mt. Soledad cross "is a powerful sectarian symbol, the religious effect of which is evidenced by the uses to which it has been put as the backdrop for Christian sectarian events." *Id.* Although the Mt. Soledad Memorial Association ("Memorial Ass'n") requests this Court to reconsider this ruling, the Court will not do so.

Also like the situation with the Mt. Helix cross, the City of San Diego ("City") sold to the Memorial Ass'n a small plot of land underneath the Mt. Soledad cross in an attempt to comply with this Court's order. Plaintiffs argue that the sale of land is a "transparent effort to evade the terms of this court's order" and violates both the California and the United States Constitutions. (Plaintiffs' Motion to Enf. Inj., at 2). Plaintiffs seek an order requiring the recision of the land transfer to the Memorial Ass'n and removal of the cross as the only means of complying with this Court's order. (Plaintiffs' Motion to Enf.

Inj., at 1). Subsequently, this Court ordered further briefing on the legalities of the method of the sale of land to the Memorial Ass'n.

1. Method of Sale

In October of 1994, the City sold a small plot of land underneath the Mt. Soledad cross to the Memorial Ass'n. This plot of land is approximately 15-by-15, or 222 square feet in size. The City sold this plot of land to the Memorial Ass'n for $14,500. However, in order to sell the plot of land, the City passed Ordinance No. 0-17750, which was subsequently ratified by two-thirds of the voting electorate. Before reaching the question of whether the sale of 222 square feet underneath the Mt. Soledad cross corrected the constitutional infirmities, this Court expressed concern whether the actual method of sale to the Memorial Ass'n was both legal and passed constitutional muster.

a. Compliance with the City's Council Policy and Charter

It is clear to the Court that the method of sale complied with the City's own Council Policy 700-10 on the "DISPOSITION OF CITY OWNED REAL PROPERTY." (Council Policy 700-10, at 2). Under Section C(I) of the City's Council Policy 700-10, entitled "Sale of Real Estate," the City may sell real property, generally by public auction "unless the parcel meets the criteria for a negotiated transaction as hereinafter set out in 3 below." (Council Policy 700-10, at 3). Section C(3) lists the conditions under which a negotiated sale may be approved. (Council Policy 700-10, at 4). Section C(3)(e) provides for a negotiated sale:

> When qualified nonprofit institutional organizations offer to purchase City-owned land, a negotiated sale may be consummated at fair market value providing

> there is 1) a development commitment; and 2) a right to repurchase or reversion upon a condition subsequent. Institutional organizations such as churches, hospitals, extended care facilities, private schools and community service organizations are required to develop under the City's conditional use permit procedure.

In short, under its own Council Policy, the City may conduct a negotiated sale with a qualified nonprofit organization, which may be religious in nature, provided that there is both a development commitment and a right to repurchase or reversion upon a condition subsequent.

The sale to the Memorial Ass'n complies with the requirements for a negotiated sale under Section C(3)(e) of the City's Council Policy. In the grant deed, the Memorial Ass'n is designated as a "California nonprofit association." None of the parties dispute this designation. The Memorial Ass'n has also agreed to maintain the cross and "preserve the land as open space for the benefit of the public." (Ordinance No. 0-17750). This would satisfy the requirement that the Memorial Ass'n has a development commitment. Finally, the City reserved the right to repurchase the land if it is determined that the cross may stand on public land. (Ordinance No. 0-17750). Accordingly, the sale to the Memorial Ass'n does comply with the City's Council Policy on the sale of City owned real property.

Likewise, the sale of the land also complies with the City's Charter. Section 1 of the San Diego City Charter ("Charter") permits the City to sell, lease, convey, exchange, manage, and dispose of its real property in the city's interests. Section 2 of the Charter states that the City's powers are subject only to the restriction and limitations of the Charter. Section 55 of the Charter allows for the sale of dedicated park land provided that such change is either "first authorized or later ratified by a vote

of two-thirds of the qualified electors of the City voting at an election for such a purpose." It is not disputed that two-thirds of the voters ratified the sale of land under the Mt. Soledad cross. Proposition F states:

> Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to maintain the property as an historic war memorial, and the transfer of the same parcel by The City of San Diego to a private non-profit corporation for not less than fair market value be ratified?

Although plaintiffs argue that the land was not sold for fair market value, they have not submitted any evidence to the contrary. Accordingly, it appears that the sale of land to the Memorial Ass'n complies with both the City's Charter and the Council Policy. The question that remains is whether the method of sale to the Memorial Ass'n violates the California or the United States Constitutions.

b. Constitutional Issues

This Court stated in its Order that "[w]ere the parcels of land atop the Mt. Helix and Mt. Soledad crosses presently stand privately rather than publicly owned, then these cases would be entirely different." *Murphy v. Bilbray,* 782 F.Supp. at 1438. Rather than remove the cross entirely, the City has attempted to comply with this Court's Order by transferring a small plot of land underneath the Mt. Soledad cross. Plaintiffs now argue that both the method of sale to the Memorial Ass'n and that such a small size plot of land was transferred violate both the California and United States Constitutions. The City argues that "the sale at issue has both the purpose and effect of distancing the City from any entanglement with a structure symbolic of Christianity." (City's Opp. to Enf. Inj., at 6).

Generally, a court will "avoid adjudication of federal constitutional claims when alternative state grounds are available." *Hewitt v. Joyner,* 940 F.2d 1561, 1565 (9th Cir. 1991), *cert. denied, Joyner v. Hewitt,* 502 U.S. 1073 (1992), *citing Siler v. Louisville & Nashville R.R. Co.,* 213 U.S. 175 (1909). Since this Court finds the method of sale violates the California Constitution, it will not address plaintiffs' federal constitutional claims. *Id.*

The California Constitution contains several provisions which mandate a separation between church and state. The first provision is article I, section 4, which is very similar to the language in the federal constitution. Section 4 states, in pertinent part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . .The Legislature shall make no law respecting an establishment of religion.

Cal. Const. Art I, § 4. California courts have consistently held that this "no preference" clause not only prohibits a governmental body from preferring one religion over another, but requires that the governmental body's actions may not even *appear* preferential. *Hewitt,* 940 F.2d at 1657. Furthermore, in his concurring opinion in *Sands v. Morongo Unified School Dist,* 53 Cal.3d 863, (1991), Judge Mosk describes the prohibition against religious preference this way:

> The preference clause seeks to prevent government from giving *any* advantage to religion in California. The relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state.

Sands, 53 Cal.3d at 911-912 (emphasis added).

The second provision is article XVI, section 5 which "strictly prohibits any governmental support for religious purposes." *Id.* Section 5 states, in pertinent part:

> Neither the Legislature, nor any county, city and county, . . . or other municipal corporation, shall ever make an appropriation, . . . or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help support or sustain any school, . . . or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of real property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever. . . .

Cal. Const. Art. XVI, § 5.

The California courts have held that this section "admits of no de minimis exception....The ban is on aid to religion in *any* form." *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal.App.3d 79, 93 (1990) *quoting Fox v. City of Los Angeles*, 22 Cal.3d 792, 806 (1978). Accordingly, this section prohibits not only monetary aid to religion, but *any* official involvement that promotes religion. *California Educ. Facilities Auth. v. Priest*, 12 Cal.3d 593, 605, fn. 12 (1974). The Ninth Circuit has stated that these and other provisions of the California Constitution are "'proof of the framers' intent to build a Jeffersonian wall of separation between church and state.'" *Hewitt*, 940 F.2d at 1566, *quoting Sands*, 53 Cal.3d 863 (1991).

It is apparent to the Court that the City's primary purpose for the sale to the Memorial Ass'n of the small plot of land underneath the Mt. Soledad cross was to save the Mt. Soledad cross from removal and/or destruction. First and most telling, is the wording on Proposition F. Several times in the

ARGUMENT IN FAVOR OF PROPOSITION F, it states that the intent of Proposition F is to "SAVE THE CROSS ON MOUNT SOLEDAD." Second, the City did not sell the parcel of land to the Memorial Ass'n until after the Supreme Court denied the City's Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion, which upheld this Court's order forbidding the permanent presence of the Mt. Soledad cross on public property.

It is the City's efforts and actions, though understandable, to "save" the Mt. Soledad cross, "a powerful sectarian symbol,"[1] that violate the "no preference" clause of the California Constitution. Article I, section 4, prohibits even the *appearance* of preference for one religion over another. For the City to take the position of trying to "save" such a preeminent Christian symbol such as the Latin cross atop Mt. Soledad clearly shows a governmental preference for the Christian religion. It is this appearing to prefer one religion over another which the California Constitution prohibits.

The method of sale to the Memorial Ass'n also violates both article I, section 4 and article XVI, section 5 of the California Constitution. The City entered into a negotiated sale with only the Memorial Ass'n. No other person or entity was allowed to either bid or offer to buy the plot of land underneath the Mt. Soledad cross. Although the Memorial Ass'n both erected the Mt. Soledad cross, maintains and conducts Easter sunrise services at the site and accordingly, would be a likely candidate to purchase the land underneath the cross, it is the exclusion of any other purchasers of or bidders for the land that gives the appearance of preferring the Christian religion over all others. This exclusion of any other purchasers or bidders also promotes and aids the Christian religion because it is

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[1] *Murphy v. Bilbray*, 782 F.Supp. at 1436.

assumed that the Memorial Ass'n would continue to nightly illuminate the Mt. Soledad cross and permit use of the site "as the backdrop for Christian sectarian events, such as weddings, baptisms and Easter sunrise services." *Murphy v. Bilbray,* 782 F.Supp. at 1436. Again, it is this type of preference and/or aid to the Christian religion that the California Constitution forbids.

2. Size of plot

Finally, even if the method of sale passed constitutional muster, the City's attempt to comply with this Court's order by selling only a small portion of the land underneath the Mt. Soledad cross still shows a preference or aid to the Christian religion. The City sold approximately 222 square feet of land underneath the Mt. Soledad cross directly to the Memorial Ass'n. However, this small plot of land sits in the middle of approximately 170 acres of municipally owned and maintained park land. Moreover, the Mt. Soledad cross sits high atop a hill and is the focal point of the municipally owned park. To reach the cross or the summit of the hill, a visitor must travel through several acres of the municipally owned park. Despite a small disclaimer plaque, it is hard for this Court to imagine that any visitor to the Mt. Soledad hilltop and cross would not conclude that the City was directly involved in the preservation and maintenance of the Mt. Soledad cross. Again, this violates the California constitutional strictures against state preference or aid of religion. Accordingly,

IT IS ORDERED that:

A. Mt. Helix Cross

1) The 1929 indenture by Cyrus Yawkey created a charitable trust of the real property, the Mt. Helix cross, and the funds set aside the maintenance of both.

2) The Attorney General shall be added as a necessary party to this action and be apprised of the ongoing litigation.

B. Mt. Soledad Cross

1) Both the method of sale and the amount of land sold underneath the Mt. Soledad cross do not cure the constitutional infirmities outlined in this Court's previous Order.

September 18, 1997
date

/s/ Gordon Thompson Jr.
GORDON THOMPSON, JR.
United States District Judge

cc: All counsel and parties without counsel

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-55406
D.C. No. CV-89-00820-GT

PHILIP K. PAULSON,

Plaintiff-Appellant,

v.

CITY OF SAN DIEGO,
MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,

Defendants-Appellees.

FILED
OCT 22 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: SCHROEDER, Chief Judge, and PREGERSON, KOZINSKI, FERNANDEZ, RYMER, T.G. NELSON, HAWKINS, GRABER, W. FLETCHER, BERZON, and RAWLINSON, Circuit Judges.

Chief Judge Schroeder, and Judges Pregerson, Kozinski, Hawkins, Graber, W. Fletcher, Berzon, and Rawlinson have voted to deny the petitions for en banc reconsideration and full court rehearing or for certification to the California Supreme Court or for remand to the trial court. Judges Fernandez and Rymer have voted to grant the petitions for full court rehearing and otherwise to deny the petitions. Judge T. Nelson has voted

to grant the petitions for en banc reconsideration and otherwise to deny the petitions.

The full court has been advised of the petitions for rehearing before the full court and no judge has requested a vote on any of them.

The petitions for en banc reconsideration and full court rehearing or for certification to the California Supreme Court or for remand to the trial court are DENIED.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55406
D.C. No. CV-89-00820-GT

PHILIP K. PAULSON,

Plaintiff-Appellant,

v.

CITY OF SAN DIEGO,
MT. SOLEDAD MEMORIAL ASSOCIATION, Inc.,

Defendants-Appellees.

FILED
MAR 01 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BEFORE: SCHROEDER, Chief Judge.

ORDER

The parties are ordered to file simultaneous supplemental briefs (20 copies) not to exceed 20 pages within 21 days from the date of this order addressing whether the existence of this cross violates the Establishment Clause of the First Amendment of the U.S. Constitution or the "No Preference Clause" of the California Constitution.

APPENDIX F

No. 00-55406

Decision Filed August 22, 2001
Judges Procter Hug, Jr., John M. Duhe, Jr.,
and Richard C. Tallman

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON
Plaintiff-Appellant

v.

CITY OF SAN DIEGO, et. al
Defendants-Appellees

On Appeal from the Order of the United States District Court
For the Southern District of California
The Honorable Gordon Thompson, Jr., Presiding

PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

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[Tables Omitted in Printing]

AUTHORITY FOR PETITION

Plaintiff-Appellant Philip Paulson respectfully petitions the Court for rehearing/rehearing *en banc* pursuant to Fed. R. App. P. 35(b).

Rehearing *en banc* is appropriate under Rule 35(b)(1)(A) because two of the Panel's determinations conflict with decisions of this Circuit. First, the Panel held that the No Preference Clause of the California Constitution provides no greater protection against religious preference than the Federal Establishment Clause. *Slip op.* at 11329. This holding overrules the Circuit's previous rulings on the question. *Ceniceros v. Board of Trustees of the San Diego Unified School Dist.*, 106 F.3d 878, 883 (9th Cir. 1997); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993), *cert. denied*, 513 U.S. 925 (1994); *Hewitt v. Joyner* 940 F.2d 1561, 1566 (9th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992); *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1015 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

Second, the Panel ruled that the City of San Diego could remedy its unconstitutional display of a large Latin cross in a public park by auctioning the cross property pursuant to procedures that empowered the City to accept or reject any bid without cause. *Slip op.* at 11332-33. In permitting the City to exercise such unfettered discretion, the Panel opinion conflicts with the decisions in *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 384-86 (9th Cir. 1996) (*en banc*) and *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 755-59 (1988).

Rehearing *en banc* is also appropriate under Rule 35(b)(1)(B) because the Panel opinion involves questions of exceptional importance: (1) the scope of protection against religious preference afforded by the No Preference Clause; (2) the constitutionality of a municipality's reservation of unfettered discretion in regulating permanent access to an expressive venue; and (3) the standard for determining whether a municipality has adequately remedied its unconstitutional display of a religious symbol upon public land.

FACTUAL AND PROCEDURAL BACKGROUND

The Panel opinion addresses whether the City of San Diego has remedied a violation of the No Preference Clause resulting from its display of a 43-foot tall cross atop Mount Soledad. In 1991, the District Court ruled that the presence of the cross was unconstitutional and enjoined its display. *Murphy v. Bilbray,* 782 F. Supp. 1420 (S.D. Cal. 1991). This Court affirmed. *Ellis v. La Mesa, supra,* 990 F.2d 1518.

In response, the City sold the cross and a 15-foot circle of land at its base to the Mt. Soledad Memorial Association ("Association"), which built the cross in 1952 and maintained it thereafter. Plaintiff moved to void the transaction. The District Court granted the motion on grounds that the sale of the cross to an entity committed to its preservation, coupled with the slight size of the transferred plot, did not remedy the violation and itself breached the No Preference Clause. (EOR #1, pp. 9-15)

The City thereafter proposed a new sale involving one-half acre of land at the base of the cross, entirely encircled by the public driveway which provides access to the open area atop the 170-acre park. Adjoining the circular drive are large grassy areas, benches, water fountains, parking spaces, and trails leading down the mountainside, all of which the City proposed to retain as public property. (EOR #6 and #7, pp. 71-115)

The City auctioned the parcel pursuant to terms that again favored the Association. The City required that bidders agree to preserve the parcel for use as a "war memorial" -- a restriction that mirrored the Association's longstanding characterization and intended use of the property. (Exh. 1 to attached Appendix, pp. 1-3) The City ranked bidders based on their "expertise" in maintaining war memorials -- again to the benefit of the Association, which had maintained the cross for the preceding half century. (*Id.*, pp. 2-3) Finally, the City retained complete discretion to accept or reject any bid without cause. (*Id.*, p. 2) The Association, which offered the highest of the five bids submitted, was again awarded the property. (Association's EOR Vol. 1, #1, pp. 0001-2)

Plaintiff again moved to enforce the injunction on grounds that both the method of sale and the amount of land transferred neither remedied the constitutional breach nor complied with the California Constitution. The District Court upheld the transfer. (EOR #8, pp. 116-124) Plaintiff appealed.

DISPOSITION OF THE PANEL

Relying on an unprecedented interpretation of *East Bay Asian Local Development Corp. v. State of California,* 24 Cal. 4th 693 (2000), *cert. denied,* 121 S. Ct. 1735 (2001), the Panel held that the California Constitution no longer provides greater protection against religious preference than the Establishment Clause. Pursuant to this newly-diluted standard, the Panel rejected each of plaintiff's objections to the sale, *slip op.* at 11331-33, and ruled that the slight amount of land transferred was permissible based on its demarcation from the surrounding parkland. *Slip op.* at 11335-36. The Panel declined to address plaintiff's argument that the size of the plot itself, irrespective of its demarcation, continues to communicate a message of religious preference when viewed in the context of the surrounding public property.

ARGUMENT

I. The Panel Erroneously Rejected Longstanding State And Circuit Precedent Construing The Scope Of Article I, Section 4, Of The California Constitution

The No Preference Clause has long been construed to provide separate and broader protections than the Establishment Clause. Notwithstanding this authority, and based only on a brief and ambiguous passage from a recent decision of the California Supreme Court which expressly disavowed any definitive construction of the provision, the Panel held for the first time that the state's No Preference Clause is subordinate to the federal guarantee. The Panel reached this conclusion despite the fact that no party had even contested the District Court's contrary holding. (EOR #8, p. 118) ("It is undisputed in this case that the No Preference Clause of the California Constitution is broader in scope and more protective than the Establishment Clause of the United States Constitution.") This departure from the established interpretation of California's constitutional commands, reached without benefit of briefing or argument, is erroneous and requires rehearing/rehearing *en banc*.

A. State And Federal Courts Have Long Recognized The Broad And Independent Protections Afforded By Article I, Section 4

California courts have held repeatedly that the No Preference Clause more strictly separates church and state than the federal guarantee. As the California Supreme Court observed in 1978, the provision forbids religious preference "even when there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive." *Fox v. City of Los Angeles,* 22 Cal. 3d 792, 796 (1978). The force of this prohibition was underscored in Justice Kennard's plurality opinion in *Sands v. Morongo*

Unified School District, 53 Cal. 3d 863 (1991), *cert. denied,* 505 U.S. 1218 (1992):

> The Attorney General of this state has observed that "[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the "no preference" clause [citation omitted], and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee.

Id. at 883; *see, e.g., Hart v. Cult Awareness Network,* 13 Cal. App. 4th 777, 792 (1993); *Lucas Valley Homeowners Assoc., Inc. v. County of Marin,* 233 Cal. App. 3d 130, 145 (1991); *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.,* 218 Cal. App. 3d 79, 92 (1990); *Okrand v. City of Los Angeles,* 207 Cal. App. 3d 566, 571-72 (1989); *Bennett v. Livermore Unified School Dist.,* 193 Cal. App. 3d 1012, 1016, 1024 (1987); *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal. App. 3d 1076, 1092 (1984), *cert. denied,* 470 U.S. 1052 (1985).

Courts of the Circuit have recognized this principle for at least fifteen years. *Ceniceros v. Board of Trustees of the San Diego Unified School Dist.,* 106 F.3d at 883; *Carpenter v. City & County of San Francisco,* 93 F.3d at 629; *Ellis v. City of La Mesa,* 990 F.2d at 1528; *Hewitt v. Joyner,* 940 F.2d at 1566; *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco,* 784 F.2d at 1015; *see also Brown v. Woodland Joint Unified School Dist.,* 27 F.3d 1373, 1384 (9th Cir. 1994); *Alvarado v. City of San Jose,* 94 F.3d 1223, 1232 (9th Cir. 1996).

In view of the independent character of the No Preference Clause, courts enforcing the provision have employed an analytic approach that is distinct from the federal *Lemon* test.

Hewitt, 940 F.2d at 1565. The inquiry focuses, *inter alia,* on whether the conduct at issue has created even an appearance of preference, irrespective of its intent or actual effect. *Id.* at 1567; *Ellis,* 990 F.2d at 1524; *Sands,* 53 Cal. 3d at 883; *Hart,* 13 Cal. App. 4th at 792; *Feminist Women's Health Center,* 157 Cal. App. 3d at 1092. The analysis bears little relation to the *Lemon* inquiry and is plainly independent of it. *See, e.g., Carpenter,* 93 F.3d at 630; *Ellis,* 990 F.2d at 1524-25; *Murphy,* 782 F. Supp. at 1428-29; *Lucas Valley Homeowners Assoc., Inc.,* 233 Cal. App. 3d at 145-46; *DiLoreto v. Board of Education,* 74 Cal. App. 4th 267, 278 (1999), *cert. denied,* 529 U.S. 1067 (2000); *Okrand,* 207 Cal. App. 3d at 578-80; *Mandel v. Hodges,* 54 Cal. App. 3d 596, 617 (1976).

B. The Panel Substantially Diluted The Force Of The No Preference Clause Based On A Misinterpretation Of *East Bay Asian Local Development Corporation v. California*

Rejecting the foregoing authority, the Panel ruled for the first time that the No Preference Clause assures no greater protection against religious preference than the Establishment Clause. The Panel based this holding on a recent California Supreme Court decision addressing the constitutionality of a statute that permits religiously-affiliated organizations to exempt themselves from the state's historic preservation laws. *East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal. 4th 693. The Court in *East Bay* first determined that the challenged statute withstood scrutiny under the Establishment Clauses of both the state and federal Constitutions, which it read coextensively. 24 Cal. 4th at 704-719. The Court then turned to the No Preference Clause:

> This court has never had occasion to definitively construe the no preference clause of article I, section 4 *and we need not do so here.* In guaranteeing free

> exercise of religion "without discrimination or preference," the plain language of the clause suggests, however, that the intent is to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the state neither favors nor discriminates against religion. *Having concluded above that an exemption from a landmark preservation law satisfies all prongs of the Lemon test, it follows that the exemption is neither a governmental preference for or discrimination against religion.*

Id. at 719-20 (italics added).

The Court thus explicitly instructed that its ruling be understood as an application of the No Preference Clause to the facts before it -- "an exemption from a landmark preservation law" -- rather than a "definitive[ ] constru[ction]" of the provision. The Panel ignored this admonition and concluded instead that the opinion "suggests that the United States Constitutional standard is either equally restrictive or more restrictive than the No Preference Clause of the California

Constitution."[1] *Slip op.* at 11329. The Panel's analysis is flawed in several respects.

First, the Panel misconstrued the pivotal language underlying its analysis. The Panel deduced that the two constitutional provisions are at best coextensive based on the Court's statement that the No Preference Clause analysis "follows" from its preceding discussion of the Establishment Clause. The word "follow" cannot bear such weight. That the analysis of one provision follows another on a particular set of facts does not imply that the former is subordinate to the latter as a general matter. It suggests just as plausibly that the analyses merely overlap in those circumstances and that the discussion of the first provision is adequate to address the second. Indeed, courts analyzing questions under both constitutional provisions often use the federal analysis to inform, but not constrain, the broader state inquiry. *Carpenter,* 93 F.3d at 630 n.5; *Christian Science Reading Room,* 784 F.2d at 1015; *Duffy v. California State Personnel Bd.,* 232 Cal. App. 3d 1, 9 (1991); *Okrand,* 207 Cal. App. 3d at 571-72; *Bennett,*

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[1] Evidently in support of this conclusion, the Panel earlier characterizes the state provision as "parallel[ing] the guarantee of the Establishment Clause..., which 'prohibits the government from appearing to take a position on questions of religious belief.' *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 594 (1989)." *Slip op.* at 11328. While certain Establishment Clause standards may substantially overlap with standards under the No Preference Clause, the provisions are distinct. Perhaps most similar are Justice O'Connor's formulation of the "effects" prong of the *Lemon* test and the "appearance of preference" standard set forth in *Hewitt, Ellis,* and related cases. *See Allegheny,* 492 U.S. at 595 ("perception of endorsement" standard); *Capital Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 773 (1995) (O'Connor, J., conc.). However, that federal inquiry still focuses on whether conduct is perceived to "endorse" religion while the state inquiry asks merely whether it appears "preferential." Because one may prefer religion without endorsing it, the state inquiry remains more demanding even when measured against strongly separationist formulations of the federal guarantee.

193 Cal. App. 3d at 1018-24. The Court in *East Bay* appears to have done nothing more.

The Panel also failed to assess the fundamental difference between the matters at issue in *East Bay* and the instant case. *East Bay* considered a law providing all religions with equal access to a statutory exemption. In contrast, this case involves allegations that the City acted in favor of one religion to the detriment of others. Even if the No Preference Clause is understood as coextensive with the federal guarantee in circumstances involving a benefit conferred upon religion generally, it does not follow that the two provisions are coextensive with respect to conduct alleged to prefer and discriminate between religions. Indeed, some courts have concluded that the No Preference Clause applies only to "preference in favor of 'one religion as opposed to another' religion" and is thus inapplicable where a "religious exemption applies to all religious non-profit organizations," as in *East Bay*. *Pieszak v. Glendale Adventist Medical Center,* 112 F. Supp. 2d 970, 996 n.25 (C.D. Cal. 2000). At a minimum, such a fundamental contextual distinction should have dissuaded the Panel from extrapolating the analysis in *East Bay* beyond its specific facts.

Finally, the Panel failed to consider the fact that Justice Kennard, the author of the plurality opinion in *Sands v. Morongo* which expressly affirmed the broad and independent reach of the No Preference Clause, joined the majority in *East Bay*. In construing *East Bay's* brief and ambiguous analysis, the Panel erred in affording no weight to Justice Kennard's evident belief that *East Bay* and *Sands* are reconcilable -- which must be the case unless she has silently forsworn the views she so forcefully articulated in her earlier opinion.

For these reasons, it was error for the Panel to renounce state and Circuit authority establishing that the No Preference

Clause is more protective of church-state separation than the Establishment Clause. Rehearing/rehearing *en banc* should be granted to resolve the conflict.

II. The Panel Erroneously Upheld The City's Reservation Of Unfettered Discretion In Regulating Access To A Preeminent Venue For Speech

In its bid solicitation, the City reserved the right to accept or reject any bid without cause. This express retention of discretion to select or reject any purchaser constitutes a fatal flaw under Circuit and Supreme Court authority. *See, e.g., City of Lakewood v Plain Dealer Publ. Co.,* 486 U.S. at 755-59; *Rosenbaum v. City and County of San Francisco,* 2001 WL 406963 *3 (9th Cir. 2001) (unpublished disposition cited pursuant to Circuit rule 36-3(b) and set forth as Exh. 2 in the attached Appendix); *United States v. Linick,* 195 F.3d 538, 541-42 (9th Cir. 1999); *American Jewish Congress,* 90 F.3d at 384-86. The Panel declined to follow these authorities and instead articulated a new and highly deferential standard of analysis.

In selecting the winning bid, the City indisputably allocated access to an expressive forum. Such authority must be exercised with scrupulous neutrality to avoid both Establishment and Free Speech Clause concerns:

> Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum...in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate.

Pinette, 515 U.S. at 766. To avert this peril, government must abide by clear and neutral standards. *American Jewish Congress,* 90 F.3d at 384. Whenever a policy "allows for arbitrary application, it is not a valid time, place, and manner regulation. . . . In the Establishment Clause context, such a regulation also has the potential for impermissibly favoring a particular religious viewpoint." *Id.* at 385.

In determining that the City did not violate this principle, the Panel distinguished *American Jewish Congress* on grounds that the regulatory scheme in that case contained no standards whatsoever, and that "[s]uch truly absolute discretion without any standards is clearly distinguishable from the city council's discretion here." *Slip op.* at 11333. The reasoning makes no sense: whether no criteria or hundreds are set forth, a blanket reservation of discretion permitting the decision-maker to disregard any or all of them condemns the entire process. Indeed, in the seminal *Lakewood* decision, the regulatory scheme contained numerous criteria but was nonetheless struck down on grounds that the ordinance additionally reserved to the mayor discretion to impose "any 'other terms and conditions deemed necessary and reasonable.'" *Lakewood, supra,* 486 U.S. at 754 and n.2; *see* 794 F.2d 1139, 1141 (6th Cir. 1986) (text of ordinance). As the Court stated, such a scheme is subject to challenge so long as it "gives a government official or agency *substantial power* to discriminate based on the content or viewpoint of speech. . . ." *Lakewood* at 759 (italics added). The discretion reserved by the bid solicitation indisputably gave the City such power.

The Panel next excused the provision on grounds that it appears in all of the City's bid invitations. *Slip op.* at 11333. Again the reasoning misses the point. In soliciting bids for the sale of property, the City almost never allocates among competing religious viewpoints an exclusive right of access to a premier venue for speech. In those rare instances when it

does, its conduct obviously must conform to more exacting standards. To suggest that unfettered discretion is permissible here, simply because the City retains such discretion when selling vacant lots, deprecates the constitutional principles at stake.

Finally, the Panel concluded that the reservation of discretion was justified by "the result of the process," which it claimed was "consistent with the evaluated factors." (*Id.*) This analysis flatly conflicts with settled authority instructing that discretionary regulatory schemes should be assessed without regard to outcome, precisely because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Lakewood,* 486 U.S. at 758. Thus the Circuit, sitting *en banc* in *American Jewish Congress,* struck down the regulatory decision at issue without "determin[ing] the City's actual motivation in ruling on the applications or the extent to which its determinations were based on impermissible factors," because the discretionary scheme itself condemned the outcome for purposes of the Establishment Clause.

It was error for the Panel to defy this authority. Rehearing/rehearing *en banc* should be granted to resolve the conflict.

III. The Panel Decision Failed To Articulate Appropriate Standards For Determining Whether A Municipality Has Adequately Remedied An Unconstitutional Religious Display Upon Public Land

Two aspects of the City's sale of the cross warrant special scrutiny. First, the City imposed a use restriction that directly facilitated its continued display. Second, the City sold merely a slight fraction of the public parkland in its immediate vicinity.

The Panel upheld both aspects of the sale without engaging in any critical examination of their potentially preferential effect. This was error. *See Kong v. City and County of San Francisco,* 2001 WL 1020102 *2 (9th Cir. 2001) (Canby, J., concurring under the "compulsion" of the Panel decision, which is "irreconcilable" with his view that the sale in *Kong* violates state and federal law) (unpublished disposition cited pursuant to Circuit Rule 36-3(b) and set forth as Exh. 3 in the attached Appendix).

A. Use Restrictions Facilitating The Continued Display Of A Challenged Religious Symbol Warrant Special Scrutiny

Publicly-owned crosses are frequently designated as "war memorials." The designation fails to diminish their religious character, however, and courts have accordingly rejected the "war memorial" rationale for religious displays on public land. *See, e.g., Separation of Church and State Committee v. City of Eugene,* 93 F.3d 617 (9th Cir. 1996); *Jewish War Veterans v. United States,* 695 F. Supp. 3, 14-15 (D.D.C. 1988); *Greater Houston Chapter of the ACLU v. Eckles,* 589 F. Supp. 222, 233-35 (S.D. Tex. 1984), *appeal dismissed,* 755 F.2d 426 (5th Cir.), *cert. denied,* 474 U.S. 980 (1985). Throughout this litigation the City and the Association similarly characterized the cross as a secular "war memorial." As in prior cases, that characterization was rejected. *Murphy,* 782 F. Supp. at 1437-38; *Ellis,* 990 F.2d at 1527-28. In selling the property to remedy its constitutional violation, however, the City revived the characterization and imposed it as a use restriction.

Where a sale intended to remedy a constitutional violation includes a use restriction which directly facilitates the continued display of the religious symbol -- indeed, in this case, which simply restates the government's description of the symbol itself -- heightened scrutiny is necessary to assure that

the transaction is truly neutral. In contrast, the Panel declined to even address the potentially preferential effect of the restriction and instead upheld the provision based on inapposite Seventh Circuit precedent. *Slip op.* at 11331; *Freedom From Religion Foundation v. City of Marshfield,* 203 F.3d 487, 490 (7th Cir. 2000) (*en banc*) (upholding use restriction for "public park purposes"). Analogizing the "war memorial" restriction in this case to the "public park purposes" restriction in *Marshfield* ignores that the former directly facilitates the continued religious display while the latter does not. Rehearing/rehearing *en banc* should be granted to articulate a heightened standard of scrutiny for any use restriction with such a potentially preferential effect.

B. The Panel Erred In Failing To Assess Whether The Amount Of Land Sold, Irrespective Of Its Demarcation, Was Sufficient To Remedy The Unconstitutional Appearance Of Preference

Plaintiff argued that the transferred parcel is so small and so dependent upon the infrastructure and amenities of the surrounding parkland that the appearance of preference strongly persists. Ignoring the size of the plot and its relationship to the surrounding property, the Panel dismissed plaintiff's objection solely on the basis of "whether the distinction between the public and private area is clearly marked." *Slip op.* at 11336.

Under the panel's reasoning, demarcation -- irrespective of size -- is the sole relevant inquiry. Application of this standard would have required the District Court to endorse the City's first attempt to sell the cross, involving a mere 15-foot circle of land at its base, provided that the panel had been sufficiently bounded. (EOR #1, p. 14). To avoid such an improbable result, courts must separately inquire whether the size of the transferred parcel, regardless of the manner of its demarcation, adequately dissipates the appearance of preference. This inquiry

will depend upon the size and configuration of the park itself but should consider (1) the supporting infrastructure, if any, remaining on public land; (2) the supporting amenities, if any, remaining on public land; and (3) the amount of land sold in relation to the total amount of usable park space.

The Panel's failure to engage in this separate inquiry was error. Rehearing/rehearing *en banc* should be granted to address and correct it.

CONCLUSION

For the reasons set forth above, plaintiff respectfully requests that rehearing/rehearing *en banc* be granted in this matter.

Dated: September 25, 2001

Respectfully submitted,
LAW OFFICES OF
JAMES E. McELROY

ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL
COUNTIES

By: Jordan C. Budd
Jordan C. Budd
Attorneys for Plaintiff-Appellant

[Certificate of Compliance Omitted in Printing]

APPENDIX G

PROVISIONS INVOLVED

U.S. Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution Article XVI, § 5.

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

APPENDIX H

Mt. Soledad Memorial Association

Purchase Proposal

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Mt. Soledad Memorial Association, Inc.
2000 Spindrift Drive, La Jolla, CA 92037
Phone: (619) 454-6500 Fax: (619) 454-1064

July 30, 1998

City of San Diego
Real Estate Assets Department
Attention: Christian Anderson, Property Agent
Security Pacific Plaza
1200 Third Avenue, Suite 1700
San Diego, California 92101

RE: Purchase Proposal
Mt. Soledad Memorial Site

Dear Mr. Anderson:

The Mt. Soledad Memorial Association desires to purchase the parcel of land in Mt. Soledad Park in the community of La Jolla which is currently for sale by the city of San Diego with a bid closing date of 7/31/98 as described in The City of San Diego's undated "Invitation for Purchase Proposals, Mt. Soledad Memorial Site." The Mt. Soledad Memorial Association is a private non-profit 501 (c) (3) corporation registered in the state of California and is therefore qualified to submit a purchase proposal.

1. Initial Purchase Price Offered:		**$ 106,000**
a)	Deposit enclosed:	$ 5,000
b)	Paid to date:	$ 14,500
c)	Cash at close of Escrow:	$ 86,500

2. Additional Offer:

If our bid is accepted by the city we will undertake the fundraising campaign described later in this proposal. The installation of memorial plaques in the park will enable us to contribute substantial sums to the city for the improvement of Mt. Soledad Park. The value of these improvements is expected to exceed: $100,000. (See Exhibit 9 for proposed project budget.)

3. Summary of Experience:

a) Complete Name of the Organization:
Mt. Soledad Memorial Association, Inc.

b) Business Address of the Organization:
2000 Spindrift Drive, La Jolla, CA 92037
Phone: 619-454-6500
Fax # : 619-454-1064

c) Articles of Incorporation: Attached as Exhibit 1.

d) Bylaws: Attached as Exhibit 2.

e) Tax Identification Numbers:
Federal Tax ID Number: 95-2373533
State Tax ID Number: CT-99186

f) Banking References:

a) Scripps Bank
7817 Ivanhoe Street
La Jolla, CA 92037
Contact: Walter Matranga, Vice President
Phone: 456-2265

(1) Savings A/C #: 142058573

b) Bank of America
The Private Bank #1289
450 "B" Street
San Diego, CA 92101
Contact: Teofla Rich, Vice President
Phone: 619-515-5743

(1) Checking A/C #: 12890-02674

(2) Savings A/C #: 01708-50004

g) Proposer's Experience and Qualifications:

i) Years in Operation: 46 Years

The Mt. Soledad Memorial Association, Inc. was founded in 1952. From the time it was founded to the present day, it has raised funds, directed the development of the park, maintained the memorial, participated in and/or organized annual memorial services and generally worked to make the community aware of the significance of the war memorial. In recent years it has also maintained the small portion of land inside the wrought iron fence.

Many of its trustees are engaged in businesses that require the organizational skills needed to maintain, improve and promote the memorial.

ii) Accomplishments of the Mt. Soledad Memorial Association:

a) Creation of the Mt. Soledad Memorial: From 1952 to 1954 our organization conducted a fundraising drive for the purpose of creating a veterans memorial on Mt. Soledad. Our organization designed and built the memorial with the help of the community.

b) Improvement of the park: At the time the memorial was built the park was unimproved land. There was not even a road to the site. Our organization's main purpose after creating the memorial was "...To promote community interest in the development of the public facilities of the Mt. Soledad Park area...". The improvements we orchestrated, with the help of the Recreation and Parks Dept., after creating the memorial include: paved roads, parking lots, curbs, landscaping (including irrigation systems), benches, trash cans, sidewalks, drinking fountains and even a sign to identify the site as a public park. Our association often contributed on a matching funds basis to these improvements and in some cases did the improvements without cost to the city. The result is a park that is one of the most frequently visited tourist sites in the county.

c) Designation of the Memorial as an Historic Site: Our organization cooperated with and assisted Doris Baur when she applied for designation of the memorial as an historic site by the City of San Diego. Her application was successful so the memorial is now officially listed as Historic Site #267 in the city of San Diego. (See Exhibit 5)

iii) Trustee Resumes: See Exhibit 8

h) Qualifications for maintaining the property as an historic war memorial.

i) We are a Private Non-Profit 501 (c) (3) corporation. (See Exhibit 3)

ii) We created the war memorial and helped get it designated as an historic site by the City of San Diego.

iii) We have a history of 46 years of successful maintenance of this historic war memorial.

iv) Our Articles of Incorporation permit us "...to own real property; to deal in real property; to deal in personal property; to have and to exercise all the powers conferred by the laws of the State of California upon non-profit corporations..."

v) Our organization was formed by American Legion Post #275 for the purpose of creating and maintaining a permanent war memorial on top of Mt. Soledad. Military organizations continue to play a prominent role in our organization.

   a) Our Vice President, Carl Dustin is the Adjutant and Immediate Past Commander of American Legion Post #275 of La Jolla.

   b) Trustee Bailey Gallison is a long time member of the same post.

   c) Trustee Chuck Leighton is the Current Commander of the Veterans of Foreign Wars Post #11044.

   d) Trustee Ralph McClain is the Judge Advocate of VFW Post #11044.

   e) Trustee Johnnie Miller is the Adjutant of VFW Post #11044.

f) We intend to continue our close association with the local military organizations by keeping representatives on our board of trustees at all times.

vi) For the past 46 years the Mt. Soledad Memorial Association has held annual memorial services on the site in conjunction with our local military organizations in remembrance of our war dead. We will continue to hold these services annually on Memorial Day if our bid is accepted and we will publicize these events to make the general public aware of the memorial's significance.

vii) We propose to use a property management company, Capital Growth Properties, to undertake the daily inspection and maintenance of the property. A copy of the proposed contract is included with this proposal as Exhibit 4. Capital Growth Properties has provided our organization with property inspection services for the past two years since we acquired the property inside the wrought iron fence in Mt. Soledad Park and it is willing to expand the service to include all maintenance of the half acre parcel.

viii) Inspection of our financial statements will show that we have the financial capability to maintain the half-acre parcel we are seeking to purchase from the city. We also have a fundraising track record that suggests we can do more than just maintain the memorial.

a) After purchasing this parcel of land we will be left with about $10,000 in our treasury.

b) Our proposed annual operational budget is included with this proposal as Exhibit 9.

ix) In addition to the professional property management service mentioned above, the local veterans' organizations have committed to provide volunteer inspection services from members of their organizations and Boy/Girl Scout Troops (See Exhibit 6). We will also seek to enlist the aid of other youth organizations. With their help, we believe that the condition of the property will be kept at a level that meets or exceeds that of the surrounding park at all times.

x) If our bid is accepted by the city of San Diego we plan to pursue designation of the memorial by the State of California as an historic site.

xi) As a long range plan, we propose the installation of memorial plaques on the site to recognize those who died in the wars. The sale of these plaques would provide our organization with a sizable income that would be used to maintain and enhance the memorial site as well as the surrounding park.

xii) A list of suggested park improvements is shown in Exhibit 7. Our organization is willing to commit to raising the funds for these long range improvements if our bid is accepted by the city.

4. Financial Statements.

a) Listing of all assets and liabilities.
Attached as Exhibit 10.

b) Our ability to fund the full amount of the bid.

i) The bid will be paid as follows:

a) $5,000 certified check payable to the City Treasurer is enclosed with this proposal.

b) $14,500 has already been paid to the city in connection with our purchase of the 225 sq. ft. of land inside the wrought iron fence.

c) The balance of our Initial Bid, is on hand in our checking and savings accounts. It will be deposited into escrow in the form of a certified check payable to the City Treasurer prior to the close of escrow in the event our bid is accepted by the city.

ii) The funds on hand in our bank and savings accounts are largely the result of a recent fundraising drive by our association. Interim bank statements are enclosed verifying the amounts shown in the financial statements. (See Exhibit 10)

iii) Our bid calls for the assumption of all maintenance costs of the parcel purchased. Our checking and savings accounts at Bank of America will serve as our maintenance fund. They currently have a balance of approximately $10,000. If no further funds are raised this will cover the maintenance contract for the foreseeable future. However, it is our intent to replenish this fund through the assessment of annual association dues.

We currently have 515 people who are members of our association and who have paid dues in the past. It is our belief, based on the number of people who have contributed to the present fundraising campaign, that we can build this

membership base to over 1,000 people. Our projected maintenance budget, shown in Exhibit 9, demonstrates that we will be able to pay the costs of ownership of this parcel out of the funds raised from annual dues.

iv) Our bid calls for developing a capital expenditure budget to take care of park improvements. These amounts are not presently on hand but will be raised through future fundraising drives. We believe that there will be a strong market for the sale of memorial plaques on the site. An estimate of the future revenue potential from the sale of these plaques is shown with the budget in Exhibit 9.

5. Proposed Use.

a) The Mt. Soledad Memorial Association already owns the memorial which was erected on the site in 1954.

b) We propose to leave the existing memorial in place and allow the general public free access to the memorial site with the exception of the area inside the wrought iron fence surrounding the memorial. We will not charge any fees to individuals wishing to visit the site.

However, in accordance with the current policy of the city, we would reserve the right to charge reasonable fees to groups that may wish to use the grounds for public or private ceremonies.

c) The existing memorial is already listed as an historic structure by the city of San Diego. Therefore, our proposed use is in accordance with the June, 1992 ballot initiative.

d) Our association will arrange and pay for the maintenance of the landscaping on the parcel in question in such a manner as to encourage the public to visit and appreciate the site. As mentioned earlier in this proposal, we will hire a landscaping or property management company to inspect the property on a daily basis and will supplement their professional attention with volunteer support. The result will be a clean and well-groomed memorial that will reflect well on our community.

e) If our proposal is selected, our association will enhance the memorial significance of the site by selling memorial tiles to families who wish to recognize individuals who died in the service of their country. The tiles will be installed on the site or in the surrounding public park in appropriate locations to be determined in cooperation with the city. Money realized from the sale of these tiles will be used to maintain the memorial and the landscaping on the site. Funds raised in this manner will also be used to further the purposes of our association as stated in our bylaws and articles of incorporation.

f) The Mt. Soledad Memorial Association will invite the local military organizations to hold annual remembrance services on appropriate National Holidays such as Memorial Day and Veterans Day. The general public will be welcome to attend these services and our association will help publicize them.

g) Currently, a bronze plaque, installed by our association, is attached in a prominent location to the fence surrounding the memorial. The plaque identifies the monument as a war memorial and lets the public know that it was created by the Mt. Soledad Memorial

Association in conjunction with local citizens and the Town Council of La Jolla. We will ensure that the monument continues to be identified in the future as a veteran's war memorial. In addition, we will add a plaque that identifies our association as the owner of the monument and the parcel of land on which it sits. The plaque to be installed will give the general public information about how to contact our association and will let those who visit the site know that the city has no connection with the memorial or the land on which it sits.

CONCLUSION

We believe that our organization is the most qualified private non-profit organization bidding for the purchase of the Mt. Soledad Memorial Site.

- We are based in La Jolla.
- We have a long history of service to the community.
- Local military organizations created our organization for the very purpose specified in the city's Invitation for Purchase Proposals.
- We have presented a strong cash offer for the property.
- We are willing to commit to the future development of the surrounding park.
- The ultimate value of our proposal to the city is difficult to estimate precisely, but certainly represents a "fair market value" purchase of the property over the long haul.

San Diego is a city with a long military history and tradition and it certainly deserves to have a fitting memorial to those who lost their lives in the service of their country. If you allow our organization to purchase this parcel you can be certain that we

will maintain the memorial in a manner that will reflect very favorably on our community.

We are ready and willing to meet with the City Council to discuss our proposal.

Sincerely,

/s/ William J. Kellogg

William J. Kellogg
President

[Exhibits Omitted In Printing]

(2) (2)

Nos. 02-1093, 02-1101

Supreme Court, U.S.
FILED
MAR 11 2003
CLERK

In The
Supreme Court of the United States

CITY OF SAN DIEGO,

Petitioner,

v.

PHILIP K. PAULSON,

Respondent.

MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,

Petitioner,

v.

PHILIP K. PAULSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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INTRODUCTION

Plaintiff/Respondent Philip Paulson submits this Opposition Brief in response to the Petitions for a Writ of Certiorari filed by Defendant/Petitioner City of San Diego (Case No. 02-1093) and Defendant/Petitioner Mt. Soledad Memorial Association (Case No. 02-1101).

Petitioners assert three grounds why the Court should review the decision in this matter. First, they claim that the Ninth Circuit misinterpreted article XVI, section 5, of California Constitution. The claim presents a pure question of state law and accordingly fails to satisfy the standard for certiorari review. The claim fails as well on the merits. The Ninth Circuit carefully applied California precedent to the factual record and properly concluded that the terms of the challenged sale impermissibly conferred a significant advantage upon bidders seeking to preserve the Mt. Soledad cross. As set forth below, the errors assigned to this analysis by Petitioners rest on serious distortions of the record, the law, and Petitioners' own representations to the lower courts.

Petitioners' second argument rests on a mischaracterization of the record as well. Petitioners claim that the opinion violates the federal constitutional rights of religious bidders based upon the purported fact that the ruling requires either (1) the destruction of the cross prior to any future sale or (2) a subsidy by the City only to those bidders seeking to erect a nonreligious display. The decision of the Ninth Circuit, however, says nothing regarding the terms of any required outcome; it merely remands the matter to the District Court to fashion a remedy in the first instance. Moreover, Respondent specifically disavows the two outcomes postulated by Petitioners, and will argue

on remand in favor of other remedial steps which indisputably preserve the rights of all future bidders – religious and nonreligious – to scrupulously equal treatment. At a minimum, Petitioners' request for review of such a speculative remedy should await the day that some court actually orders it.

Finally, Petitioners argue that the Association's present occupancy of the property gives rise to a "vested" entitlement to continue in possession irrespective of the constitutionality of the challenged transaction. The argument contravenes the most basic principles of judicial review. Having been placed on notice of Respondent's intention to challenge the sale, the Association took title to the property under cloud and subject to any remedial order that might be entered in this proceeding. The Association cannot strip the federal courts of their ability to decide the constitutionality of the challenged transaction on grounds that it has rooted itself upon the property and is now immune, as a matter of constitutional right, from eviction.[1]

The opinion of the Ninth Circuit is grounded firmly upon the record and the law. The Petitions should be denied.

---

[1] The City also volunteers an extended discussion of the merits of Respondent's Establishment Clause claim, despite the fact that the Ninth Circuit's opinion does not reach the question. (City of San Diego's Petition for a Writ of Certiorari ["City"] pp. 22-26) There is accordingly no ruling for this Court to review.

FACTUAL BACKGROUND

This case involves a 43-foot tall, 24-ton cross at the apex of a public park atop a prominent mountain in the City of San Diego. In an earlier phase of the litigation, the District Court ruled that the City's display of the cross violated the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991). Petitioners appealed and lost. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied*, 513 U.S. 925 (1994). The case returned to the District Court to enforce the judgment.

Petitioners first arranged a negotiated sale of the cross and a fifteen-foot circle of land at its base to the Association, which had constructed the cross in 1954 and is committed to its preservation. The sale was authorized by the electorate's passage of Proposition F, which permitted the sale of the property for use as an "historic war memorial." The ballot argument submitted by the Mayor and three council members urged that "ONLY A 'YES' VOTE ON PROPOSITION F CAN SAVE THE CROSS." (Appellant's Excerpts of Record ["ER"] 26) The District Court struck down that transaction in 1997 on grounds that the sale of the cross to an entity committed to its preservation, for the express purpose of saving the religious monument, did not remedy the violation and itself breached the California Constitution. (ER 9-15)

Relying again on Proposition F, the City next proposed an open-bid transaction that continued to impose upon all purchasers the requirement that the property be used as an "historic war memorial" – a restriction mirroring the Association's longstanding characterization and intended use of the cross. (ER 29) The City ranked bidders based on their "expertise" in maintaining war memorials – again to

the benefit of the Association, which had maintained the cross for the preceding half century. (ER 18-20, 29) Finally, the City retained complete discretion to accept or reject any bid without cause. (ER 19) The Association, which offered the highest of the five bids submitted, was again awarded the property. (Appellee Mt. Soledad Memorial Association's Excerpts of Record ["Assoc. ER"] 1-2)

Respondent again moved to enforce the injunction on grounds that the sale neither remedied the constitutional breach nor complied with the state or federal Constitutions. The District Court upheld the transfer. (ER 116-124) Respondent appealed. The Ninth Circuit, sitting *en banc*, reversed on grounds that the transaction impermissibly favored bidders seeking to preserve the cross in violation of article XVI, section 5, of the California Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*).

The Court of Appeals' analysis focused on the war-memorial use restriction that the City imposed as a condition of sale, coupled with the fact that the City deemed the existing cross to be precisely such an "historic war memorial" for purposes of satisfying that restriction. As the Court explained, these terms skewed the sale in favor of bidders seeking to preserve the religious symbol, for they alone did not have to incur the substantial additional expense of removing the cross and erecting a new memorial in its place. 294 F.3d at 1129-34. The Ninth Circuit concluded that this unequal burden placed upon bidders seeking to erect a non-Christian memorial was squarely at odds with the considerable body of California case authority

construing the No Aid Clause of the California Constitution.[2] *Id.*

ARGUMENT

I. THE NINTH CIRCUIT'S ADJUDICATION OF A SUPPLEMENTAL STATE LAW CLAIM IS NOT AN APPROPRIATE BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION.

Both Petitioners urge the Court to exercise its certiorari jurisdiction for purposes of reviewing the Ninth Circuit's application of California constitutional law principles. The request should be denied.

A. The Ninth Circuit Properly Decided The Case On The Basis Of The California Constitution.

Petitioners argue that the Ninth Circuit committed a "procedural abuse of discretion" by "ignor[ing] the properly briefed and argued federal constitutional question before it" and deciding the case instead on the basis of the California Constitution. (City, p. 6) The argument conflicts

[2] The opinion also answers Petitioners' repeated claim that the sale was "scrupulously neutral" and "for [an] undeniably secular purpose. . . . " (City, pp. 5, 17) Pointing to the fact that the sale required purchasers to use the property as an *historic* war memorial, pursuant to the language of Proposition F, the Ninth Circuit noted that the requirement could only be satisfied by the cross itself – and, thus, that the City evinced "a subjective [sectarian] goal" in its design of the transaction. 294 F.3d at 1132 n.5.

with a century of precedent governing the adjudication of federal constitutional questions.

It is long-settled that the federal courts should not reach federal constitutional issues when alternative state-law grounds are available. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95 (1982); *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997). This rule applies even when the alternative ground rests on state constitutional law. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970); *see also Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Accordingly, the Ninth Circuit properly decided this case on the basis of the California Constitution, as required to avoid the adjudication of Respondent's federal constitutional claim.

B. The Adjudication Of A Supplemental State Law Claim Does Not Meet The Standards For Certiorari Review.

The proposition that this Court rarely exercises its certiorari jurisdiction to review supplemental state law claims is manifest; the Court exists to resolve questions of national significance bearing on matters of federal law. Sup. Ct. R. 10. As the Court stated in *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983), "[w]e emphasize . . . that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *See, e.g., Duncan v. Tennessee*, 405 U.S. 127 (1972) (federal question "so interrelated with rules of criminal pleading peculiar to the State of Tennessee . . . as not to warrant the exercise of the certiorari jurisdiction of this Court"). Moreover, even in circumstances where the resolution of a state law question is

integral to the adjudication of a federal question, the Court affords "great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786-87 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989). As set forth below, such deference is wholly warranted in this case.

C. The Ninth Circuit Properly Decided The No Aid Clause Question.

The Ninth Circuit interpreted California's No Aid Clause in a manner fully consistent with the record and the law. Far from taking "free reign [*sic*] to exercise broad discretion in matters pertaining to state constitutional issues" (City, p. 13), as Petitioners allege, the Ninth Circuit's opinion reflects complete fidelity to the controlling authority of the California courts. It fully merits the great deference that this Court's precedents command.

1. The State Constitutional Question Was Properly Raised And Briefed Before The Ninth Circuit.

As an initial matter, both Petitioners claim that the Ninth Circuit's disposition of Respondent's No Aid Clause claim was made "without any briefing or argument." (City, p. 4, 12; Mt. Soledad Memorial Association's Petition for a Writ of Certiorari ["Assoc."], p. 7) The assertion conceals the dispositive fact that Respondent raised the claim in his Opening Brief and that Petitioners themselves ignored the argument thereafter. To assert now that their own failure to address the claim somehow undermines the validity of

the Ninth Circuit's ruling, and supports the proposition that this Court should revisit the question, is quite remarkable.

Respondent argued in the District Court that the challenged sale violated the No Aid Clause. (Plaintiff's Br., filed September 13, 1999, pp. 7, 9-10) The District Court accordingly addressed the claim. (ER 118-19) Respondent reiterated the argument on appeal. (Appellant's Opening Br., filed July 19, 2000, pp. 8-9, 12-14, 20) In opposition, the City and the Association both ignored the contention. The original three-judge panel nevertheless considered the claim and rejected it. 294 F.3d at 1137 n.2.

Respondent's petition for *en banc* rehearing and supplemental *en banc* brief did not focus on the No Aid Clause, reflecting the predominant focus of the decision from which rehearing was sought. However, the Ninth Circuit ordered the filing of additional copies of all original briefing pursuant to standard Circuit procedure and in recognition of the obvious fact that *en banc* rehearing rests upon the entire appellate record, not merely the supplemental submissions. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) (*en banc*) ("the *en banc* court acts as if it were hearing the case on appeal for the first time"); *see* Ninth Circuit Rule 31-1; Nelson, *et al.*, NINTH CIRCUIT APPELLATE PRACTICE, 11:270 (2001) ("Supplemental [*en banc*] briefs should be limited to the issues identified in the court's order. Unless ordered to do so, the parties should not rebrief issues covered in their earlier briefs.").

Petitioners' assertion that the Ninth Circuit decided the case on an unbriefed claim is accordingly false. The constitutional provision was left unaddressed only by Petitioners themselves, who chose to ignore a claim squarely raised in the Opening Brief.

2. The No Aid Clause Commands Governmental Neutrality, Not Nativist Bias.

Without citation to the constitutional convention that adopted the No Aid Clause or the succeeding century of precedent construing it, Petitioners declare that the provision is a poisoned product of "anti-Catholic animus." (City, p. 8; Assoc., p. 12)

Petitioners acknowledge, as they must, that "on its face the No Aid Clause purports to generally prevent government aid to religion. . . . (City, p. 7) In an attempt to transform the plain language of the provision into something new, Petitioners advance the novel proposition that the Clause is actually "based on" the nativist Blaine Amendment that was considered and rejected by Congress four years prior to California's adoption of the No Aid Clause. (*Id.*; Assoc., p. 12) In attempting to establish this purported relationship, Petitioners rely on two law review footnotes and a website link. They are not well served by their sparse authority.

One commentator upon whom the City relies says nothing about article XVI, section 5, mentioning California only in a footnote that lists twelve states whose constitutions "impose more general restrictions on aid" to religious schools. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y, 657, 675 n.88 (1998). The other commentator again says nothing about the creation of the No Aid Clause, merely listing California in a footnote among twenty-five states whose constitutions "contain so-called Blaine Amendments." Taylor, *The Costs of Denying Religious Organizations The Right to Staff On A Religious Basis*, 12 Geo. Mason U. Civ. Rts. L.J., 159, 192-93 n.125

(2002). Petitioners' website link does nothing more than quote the language of the No Aid Clause under the heading, "Blaine Amendments-California." (City, p. 8 n.9; Assoc., p. 12 n.4) Offering no analysis, no historical evidence, and no citation to any authority, Petitioners simply declare that these three trivial references establish "the shadowy past" of the No Aid Clause. (City, p. 7)

This feeble attack is at odds with every legitimate interpretive source. In the words of a California court over fifty years ago,

> [r]eference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination.

Gordon v. Bd. of Educ., 78 Cal. App. 2d 464, 472-73 (1947); *see, e.g., California Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 605 (1974) (No Aid Clause "has never been interpreted . . . to require governmental hostility to religion").

The constitutional concern reflected in the No Aid Clause – strict separation of church and state – predates the adoption of the No Aid Clause by two decades. In 1858, twenty-one years prior to the inclusion of the provision in the California Constitution, the Chief Justice of the California Supreme Court wrote: "When our liberties were acquired, our republican form of government adopted, and

our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense – a complete separation between Church and State." *Ex parte Newman*, 9 Cal. 502, 506 (1858). To suggest that the separationist sentiment reflected in the No Aid Clause was a product of the Blaine Amendment, which arose seventeen years after the decision in *Newman*, defies the historical record.[3]

In view of this interpretive and historical record, Petitioners' faint attempt to indict the motives of California's constitutional framers is unavailing.

3. The Reach Of The No Aid Clause Is Broad And Independent.

Taking a different tack, Petitioners next assert that the No Aid Clause – rather than a weapon of sectarian oppression – is instead an "obscure" provision with no "independent significance" whatsoever. (City, p. 7) Petitioners here allege that the Ninth Circuit has "cavalierly invent[ed] new state law" by enforcing the Clause at all. *Id.* In support, Petitioners offer the peculiar assertion that no previous decision applying the No Aid Clause has enforced it without separately addressing additional causes of action. *Id.* Petitioners omit to explain how this odd fact matters, since California courts have repeatedly

[3] Underscoring the neutral design of the California Constitution, the same convention that adopted the No Aid Clause in 1879 simultaneously amended article I, section 4 to "guarantee" – not merely "allow" – the free exercise of religion. *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 909 (1991) (Mosk, J., concurring).

identified the No Aid Clause as a separate and independent constraint upon government conduct. *See, e.g., Sands*, 53 Cal. 3d at 883; *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 797-798 (1981); *Priest*, 12 Cal. 3d at 605 n.12; *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154, 158 (1963). As the California Supreme Court has made plain, the No Aid Clause is "the definitive statement of the principle of government impartiality in the field of religion." *Priest*, 12 Cal. 3d at 604. The provision is hardly irrelevant.

As a corollary to this argument, Petitioners assert that the No Aid Clause is subordinate to the Establishment Clause. They base this claim on a recent decision of the California Supreme Court purportedly establishing that "the state *religion clauses* are no more protective than the federal Constitution." City, pp. 8-9 (italics added); *East Bay Asian Local Dev. Corp. v. State of California,* 24 Cal. 4th 693, 719 (2000). The claim flatly misstates the analysis of the state supreme court. The *East Bay* decision discusses only whether the No Preference Clause (article I, section 4) requires greater separation between church and state than does the federal Establishment Clause, and concludes that the Court "need not" decide that issue.[4] The opinion then discusses separately and at length plaintiff's No Aid Clause claim and makes no reference to any

[4] Petitioners' assertion is thus wrong with respect to the state No Preference Clause as well. *See Sands*, 53 Cal. 3d at 883; *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 792 (1993); *Woodland Hills Homeowners Org. v. Los Angeles Cmty. Coll. Dist.*, 218 Cal. App. 3d 79, 92 (1990); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571-72 (1989); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984).

relationship between that independent provision and the federal guarantee. Petitioners' assertion that the provision is derivative of federal constitutional law is fiction.[5]

4. The No Aid Clause Applies To Governmental Support Of A Religious Purpose Or Use, Irrespective Of Whether The Recipient Of Aid Is Itself A Religious Organization.

Petitioners next seize on the purported fact that the No Aid Clause has only been employed to strike down government support of private religious organizations – as opposed to a secular organization engaged in a religious practice or use – and urge that the Association's religious display is thus outside the scope of the Clause. (City, pp. 8, 27-28; Assoc., pp. 11, 20-21) The plain language of the No Aid Clause reaches far beyond religious organizations, however, to bar governmental "aid of any . . . sectarian *purpose*. . . . " Cal. Const. art. XVI, sec. 5 (italics added). As the court explained in *Priest*, "[t]he section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct,

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[5] Petitioners suggest that it is "arguable" that the No Aid Clause should be subject to Establishment Clause analysis based on opinions of the California Attorney General issued in 1955 and 1965. (City, p. 11 n.12) Both opinions predate the entire relevant body of California decisional law defining the unique contours of the No Aid Clause inquiry.

immediate, and substantial effect of promoting religious purposes."[6] 12 Cal. 3d at 605 n.12.

Accordingly, even accepting as true the Association's self-serving declaration that its objectives are purely secular (*cf.* Assoc. ER 229), the argument is without merit.[7] The Association's display of a towering Latin cross at the apex of the City's most prominent mountain is a sectarian purpose or use within the reach of the No Aid Clause.

5. The Ninth Circuit Properly Concluded That The Challenged Sale Provided Impermissible Aid To A Sectarian Use Or Purpose.

Petitioners finally propose a variety of reasons why the transaction at issue did not afford prohibited aid to a religious or sectarian purpose. Each argument fails.

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[6] Petitioners' characterization of No Aid Clause jurisprudence as involving only disputes arising from government aid to religious organizations is wrong as well. *See, e.g.*, *Hewitt v. Joyner*, 940 F.2d at 1571 (court invokes provision to strike down San Bernardino County's display of religious statuary on its own public parkland); *Priest*, 12 Cal. 3d at 605-06 (upholding an educational funding program on grounds that the benefits "are granted to sectarian and nonsectarian colleges on an equal basis; in *both cases* all aid for religious projects is strictly prohibited") (italics added).

[7] Both Petitioners challenge the opinion on grounds that it violated the free exercise rights of the Association. *See* Assoc., pp. 21-22; City, p. 19 n.22 (Association "has Free Exercise rights protected by the First Amendment if it wishes to espouse a religious viewpoint or engage in religious practices"). To assert that the Association is entitled to display the cross as a "religious practice[ ]" or an expression of its "religious viewpoint," but to simultaneously deny that the activity falls within the reach of the No Aid Clause, strains credulity.

a. The Ninth Circuit's Analysis Of Impermissible Aid Is Fully Consistent With California Precedent.

Citing the No Aid Clause analysis of the court in *East Bay,* Petitioners first assert that the Ninth Circuit "altogether failed to conduct any type of substantive analysis" of the holding in that decision. (City, p. 29) The claim is belied by the opinion itself, which carefully addressed the large body of California authority construing the Clause and specifically addressed *East Bay*. 294 F.3d at 1129-32.

Petitioners' attempt to align this case with the facts of *East Bay* is unavailing. There the court emphasized that no impermissible aid to religion was afforded by a statute exempting religious property from landmark regulations because the property was simply left "in the status it otherwise occupied." *East Bay*, at 721. Here, the entire point of the transaction was to *transform* the status of the property from a government-endorsed religious display to a privately-held war memorial. Far from "step[ping] out of the way" of religion, as in *East Bay* (*id.* at 729), the City engineered a transaction that increased the likelihood that certain religious bidders – with no existing rights, interests, or special claims to the subject property, unlike the organizations in *East Bay* – would prevail in obtaining it. *East Bay* condemns the challenged transaction rather than validates it.[8]

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[8] In an effort to place the case within the scope of *East Bay*, the Association argues that the transaction "simply left the cross with the same ownership status as before, in the hands of the Association." (Assoc., p. 20) The argument is hardly helpful to Petitioners' cause: if

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Petitioners also contend that a fair-market-value sale of property to the highest bidder cannot violate the No Aid Clause. (City, pp. 8, 10, 26-28; Assoc., pp. 14-18) To the extent that Petitioners merely assert the legality of an arms-length sale to the highest bidder, where all potential purchasers are accorded equal opportunity to obtain the property, the contention knocks at an open door. *Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1014-15 (9th Cir. 1986); *Woodland Hills*, 218 Cal. App. 3d at 85-86. This uncontested principle, however, has no application to the facts of this case. The property was *not* made available on an equal basis to all potential purchasers, as required by the No Aid Clause, because bidders seeking to maintain the cross enjoyed a significant relative advantage based on the fact that they did not have to budget additional monies to satisfy the war-memorial use restriction.[9]

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the transaction was designed to preserve the Association's control over the cross property, its unconstitutionality is manifest.

[9] This fact refutes Petitioners' assertion that the challenged sale was "modeled" after the remedy in an "essentially identical" case involving the Mt. Davidson cross in San Francisco. (City, p. 3; Assoc., p. 4) The City of San Francisco imposed no use restriction whatsoever upon the auctioned cross property, in contrast to the narrow "war-memorial" use restriction imposed here. (Appellant's Supplemental Excerpts of Record In Support of Reply ["SR"], 3-4) The distinction is pivotal: the latter transaction imposed substantial additional costs upon bidders seeking to display a non-Christian memorial, while the former imposed no costs at all.

b. The Record Supports The Court's Conclusion That The Display Of The Cross Is A Religious Use Or Purpose.

Petitioners implausibly assert that no aid was provided to a religious use or purpose because "the cross, in and of itself, is not inextricably intertwined with a religious message." (City, p. 29) The argument conflicts with decades of precedent and has already been rejected for purposes of this litigation.

Petitioners asserted from the beginning of this action that the cross is not a religious symbol. The District Court rejected the claim, the Ninth Circuit affirmed, and this Court denied review. *See Murphy v. Bilbray*, 782 F. Supp. at 1429. The question is thus settled between the parties and is the law of the case. *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002).

The argument is also unavailing. As the District Court explained, "[t]hat the Latin cross is the principal symbol, and a universally recognized symbol, of Christianity, however, is beyond dispute." *Murphy v. Bilbray,* 782 F. Supp. at 1429. Countless authorities corroborate the conclusion. *See* 782 F. Supp. at 1429 n.26; *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Carpenter v. City and County of San Francisco,* 93 F.3d 627, 630 (9th Cir. 1996).[10]

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[10] Petitioners assert that this analysis condemns the "crosses at Arlington National Cemetery, [which] would also have to be deemed unconstitutional" based on their religious content. (City, p. 29) Crosses in a public cemetery are constitutionally permissible, however, not because they lack religious content but because that content is not reasonably attributable to government. Individual crosses spread across

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c. The Record Supports The Court's Analysis Of The Ownership Of The Cross.

Petitioners argue that the City provided no aid to religion because the Association purportedly owns the cross, thus precluding the City from "giv[ing] it away." (City, p. 26; Assoc., pp. 11, 19) The argument fails as a matter of fact and law.

First, the premise is false. The opinion below expressly acknowledged the possibility that the Association owned the cross and explained why it made no difference. 294 F.3d at 1132 n.6. Thus the City takes the Ninth Circuit to task for failing to apprehend a fact that its decision acknowledged and addressed.

Second, even if the Court of Appeals had premised its ruling upon the City's ownership, the record would support the analysis. Indeed, for the City to castigate the Ninth Circuit for misstating the "undisputed" record in this respect is remarkable, given its own representations to that court. The City's supplemental *en banc* brief begins with the observation that "[t]he City of San Diego . . . sold the cross and the surrounding developed property to the highest bidder," and then proceeds to make express reference to the "sale" of the cross at least ten additional times – a factual impossibility if the Association, rather than the City, already owned it. *See* Appellee City of San

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a cemetery and interspersed with symbols of other religious faiths, all of which have been selected and installed at the direction of the families of the interred, hardly convey the same message of endorsement as a single, towering cross at the apex of a public park.

Diego's Supplemental Br., filed March 18, 2002, pp. 1, 6, 7, 10, 11, 13, 17, 20; *see also* ER 56, lines 5-6. If the Ninth Circuit misstated the facts in this regard, the City need not look far for an explanation.

The City's evident confusion reflects the dubious nature of its current assertion. Over the course of this litigation, Petitioners have periodically argued that the City has never owned the cross (and thus, purportedly, has no responsibility for its display), based on nothing more than Petitioners' declaration of the alleged fact. *See, e.g.*, City, p. 27 n.30 (citing Association's bid proposal). The record, however, establishes that the City – not the Association – owns the cross under California law.[11]

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[11] The 24-ton cross is plainly a "fixture" erected by the Association upon City land. *See* City's Supplemental Br., p. 13 n.14; Cal. Civ. Code § 660. California Civil Code section 1013 thus determines ownership:

> When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed . . . belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal [applicable when an individual affixes property in the good faith but erroneous belief that he owns the property].

The record reflects no evidence of an agreement permitting the Association to remove the cross, no effort by the City to require the Association to do so, nor the slightest suggestion that the parties contemplated that the symbol would ever be removed. In the absence of such evidence, the record establishes that the cross is owned by the City. This conclusion is corroborated by the only property description in the record that references the cross – the City's designation of the property as an historic landmark in 1991. (Assoc. ER 231) That document refers to the "historical site designation of Mount Soledad Park and Memorial Cross which is all of that property dedicated by action of the City Council as Mount Soledad Park."

Finally, whether the City ever owned the cross is constitutionally irrelevant. In either case, the transfer of the symbol was accomplished at the City's direction, design, and considerable expense. To suggest that the Association – if it indeed owned the symbol – played any role in structuring this transaction or carrying it out defies the facts; its interest in the entire parcel had already been voided by the District Court's 1997 Order, and the requirement that it quitclaim that interest upon repayment of its purchase price was a *fait accompli*. The Association was merely a passive bystander to the City's use of its power and resources to engineer the transaction. This record plainly supports the conclusion that the City's power and prestige were enlisted to aid a religious purpose, in violation of the No Aid Clause.

d. The Record Supports The Court's Conclusion That The Transaction Favored Bidders Seeking To Preserve The Cross.

Petitioners offer a variety of arguments why, on these particular facts, no relative advantage was afforded to purchasers who sought to satisfy the war-memorial use restriction by preserving the existing cross. Each fails.

Petitioners first argue that any purchaser seeking to remove the cross and construct a new, non-Christian memorial need only sell the cross to some willing purchaser "for a profit" to recoup its value. (City, p. 18 n.19; Assoc., p. 19) Without reaching the improbable assumptions underlying the claim – that a market exists for the cross and that any meaningful value would be placed upon it – the argument founders upon Petitioners' own representations to the lower courts. In previous

briefing, the City has instructed that "[r]emoval of the cross will likely result in its destruction. It was damaged when erected and is thought to have become more fragile over the years." (Defendant's Br., filed August 28, 1995, p. 2 n.1) How a purchaser might hope to recoup the value of the cross, once it has been reduced to rubble, is not evident.

Petitioners next argue that any purchaser could have simply requested that the Association remove the cross – in the words of the Association, to have demanded that the Association "get its cross off what is now the private property of the bidder." (Assoc., p. 19) The argument rests on the false premise that the land was sold separately from the fixtures upon it. As set forth above, California law makes plain that the cross and the land upon which it sits constitute a single piece of realty. Nothing in the terms of the transaction suggested that the Association bore an additional legal obligation to clear the land of its fixtures before quitclaiming the property to the next purchaser. (ER 19) Nor did the City's bid solicitation make any representation that the City would provide such a service; to the contrary, the plain implication was that the purchaser would get the property, cross and all. (ER 18) To pose the self-serving possibility that the Association or the City *might* nonetheless have simply removed the cross for the benefit of another purchaser – for free – despite the absence of any legal obligation to do so, is empty conjecture.

Finally, both Petitioners argue that no aid was provided because any purchaser valuing the cross would have factored that value into its bid price. (City, p. 26; Assoc., p. 14) The argument is difficult to decipher, as it appears to miss the entire point of the Ninth Circuit's analysis. The Court of Appeals' ruling turns on the fact that the terms of

the transaction required purchasers to use the property as a war memorial but provided the means to satisfy that restriction only to those purchasers intending to display the cross. All others were required to reserve funds for removal of the cross and construction of a new memorial to satisfy the use restriction – monies that the favored bidders could fully devote to the purchase price. This relative disadvantage increased the likelihood that bidders seeking to preserve the cross would submit the highest bid and obtain the property precisely because they could increase their bid to reflect the entire anticipated investment.

e. Evidence Of The Association's Investment In The Property Is Outside The Record And Is Irrelevant To The Constitutional Analysis.

Finally, Petitioners argue that no aid was afforded by the transaction because the Association allegedly has spent over a million dollars to improve the property since purchasing it. (Assoc., pp. 18-19) The factual assertion is outside the record and is irrelevant to the constitutional inquiry.

Twice the Association sought to augment the record with facts regarding subsequent improvements it allegedly has made to the Mount Soledad property, first before the original three-judge panel and again before the *en banc*

court.[12] Both motions were denied, reflecting the Ninth Circuit's appropriate focus on the legality of the transaction considered by the District Court rather than the conduct of the Association thereafter. It is highly inappropriate for the Association to urge this Court's consideration of materials that were not before the District Court and that have twice been excluded from the appellate record on that basis. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

The facts are irrelevant in any event. It is undisputed that the cross property, without any improvements at all, would have satisfied the use restriction imposed by the City.[13] That the Association has chosen to invest additional sums to improve the property does not alter the fact that it was spared the additional expense of removing the cross and constructing a new memorial in its place, and thus enjoyed a significant relative advantage over all other bidders wishing to erect a non-Christian memorial.[14]

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[12] *See* motions filed November 16, 2000 (denied by Order dated December 1, 2000), and March 18, 2002 (denied by Order dated March 26, 2002).

[13] There is no question that the preexisting cross site qualified as an "historic war memorial" for purposes of the City's use restriction: the City had already defined the property in precisely those terms. (Assoc. ER 231) The City's consideration of bids from purchasers wishing to preserve the cross also reflected its judgment that their intention to "maintain the current war memorial" satisfied the use restriction without more. (Assoc. ER 99, 109, 213, 259, 297)

[14] It is unclear whether the Association is attempting to suggest that some significant portion of its alleged $1 million expenditure is associated with its maintenance of the cross, thus implying that the removal of the symbol and construction of a new memorial may have been a less costly alternative. (*See* Assoc., pp. 18-19) If so, the record

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II. PETITIONERS' FEDERAL CONSTITUTIONAL OBJECTIONS REST ON A REMEDY NOT REQUIRED BY THE OPINION AND SPECIFICALLY REJECTED BY RESPONDENT.

While Petitioners acknowledge that the Court did not "discuss[ ] any particular remedy," they still assert that the "practical consequences" of the opinion "effectively require[ ]" that the City either (1) act with hostility toward religion by destroying the cross prior to any sale, or (2) discriminate on the basis of religious viewpoint by subsidizing only those purchasers seeking to remove the religious symbol. (City, p. 15) Based exclusively on these two postulated "consequences," the City asserts that the decision of the Ninth Circuit violates federal constitutional provisions concerning free speech (pp. 17-18), free exercise (pp. 18-20), religious establishment (pp. 16-17), and equal protection (pp. 20-21).

Any complaint resting on the postulated outcome of an opinion that admittedly requires no specific remedy at all is on its face premature. If the City believes that any particular remedy ordered on remand is at odds with its constitutional obligations, it can appeal. The matter can

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defeats the claim. The Association submitted with its bid a proposed five-year budget detailing its anticipated costs for maintaining the property, reflecting its 45 years of experience maintaining the very same cross site. (Assoc. ER 254) The only budget item that addresses maintenance of the cross is an entry for "repairs," which would encompass not merely the cross but also the surrounding memorial. The total five-year outlay for such repair work is $3,316. (*Id.*) The costs for maintaining the cross itself are some fraction of this amount.

then be addressed concretely rather than in a vacuum of supposition.

More fundamentally, Petitioners' intimated "practical consequences" are themselves fantasy. Petitioners assert that the opinion will require that the cross be destroyed before any sale, but offer no explanation why. Presumably Petitioners refer here to the Court's concern that the sale placed a burden on buyers seeking to erect a non-Christian memorial because they alone would incur the cost of removing the cross. Far from requiring that it be destroyed, however, this infirmity could be addressed by the City's simple offer to deliver the property with or without the cross, at the buyer's direction. The City then assures that all bidders may receive the property in the condition they desire, with "hostility" toward none.[15]

Petitioners also worry that the City may be forced to subsidize only those bidders intending to erect a non-Christian memorial, since others will obtain one ready-made. Again, the concern is fiction. In any future transaction, the City could simply offer the winning bidder a set amount of financial assistance to be used in the buyer's discretion to either construct a new memorial or improve the existing one – thus affording all bidders equal treatment

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[15] The City argues that this alternative remedy would impermissibly subsidize only those bidders seeking to remove the cross and erect a new memorial. (City, p. 16 n.18) The argument ignores the obvious fact that, for bidders seeking to display a Christian memorial, the City would be transferring one ready-made. To provide the former bidders with property unencumbered with a religious fixture, while providing the latter with property already containing a completed war memorial, is hardly a one-sided subsidy.

with regard to their ability to satisfy the use restriction.[16] Alternatively, the City could simply remove the war-memorial use restriction and impose instead a restriction upon the property that requires no construction at all. *See, e.g., Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000) (*en banc*) (use restriction for "public park purposes"); SR 2-4 (use restriction not imposed on sale of cross property in San Francisco).

The Ninth Circuit has instructed that such questions first be addressed by the District Court. These alternatives to the Petitioners' dim forecast thus merely illustrate the range of options available on remand. As the examples demonstrate, however, no reasonable construction of the opinion requires anything of the City but neutrality.

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[16] The City argues that this alternative "fails to address the concerns raised by the Ninth Circuit as it does not improve the financial position of those bidders wishing to remove the cross relative to those bidders wishing to maintain it." (City, p. 16 n.18) Since Respondent disagrees, no party to these proceedings will raise the objection. Moreover, the argument betrays a fundamental misapprehension of the Ninth Circuit's ruling, which requires only that bidders be placed on an equal footing with respect to their ability to purchase the property and satisfy the use restriction. If the City stipulates that a memorial constructed with the subsidy will satisfy the use restriction, the requirement is met.

III. THE ASSERTED VIOLATION OF THE ASSOCIATION'S FIRST AMENDMENT RIGHTS, BASED ON ITS PRESENT OCCUPANCY OF THE PROPERTY, IMPROPERLY SEEKS TO FORECLOSE JUDICIAL REVIEW.

In conclusion, Petitioners assert that Respondent's challenge implicates the Association's First Amendment free-speech and free-exercise rights. (City, p. 18; Assoc., pp. 21-23) To the extent that Petitioners merely suggest that the Association is entitled to equal treatment in any sale, irrespective of its religious viewpoint, there is no dispute. The opinion provides for nothing less. (*Supra*, at 24-26)

Petitioners, however, offer a far broader assertion of expressive rights. They argue that the Association and its plaque-holders have First Amendment rights that preclude or circumscribe the federal courts' ability to review the challenged transaction based simply upon the Association's present occupancy of the cross property. As the Association states, "[t]he bottom line is that it is far too late in the day to complain any further about a cross on public land, particularly based on the California Constitution, which is superceded by rights under the U.S. Constitution." Assoc., p. 22; *see* City, p. 18 (opinion allegedly "violated the vested rights of hundreds of plaque holders who invested substantial money on the memorial in reasonable reliance upon the original sale").

Petitioners assert this claim of entitlement despite the fact that they received express notice of Respondent's intention to challenge the transaction – and were specifically advised by him that "the City and the prospective buyer [should] not take any further action or incur any further expenses in this matter until this motion is heard by the court" – but nevertheless chose to go forward with

the sale and property improvements. (Respondent's Appendix 1) Indeed, even if Respondent had provided no notice at all, the Association had "actual notice of the pendency of the proceeding" and thus took the cross property "subject to any judgment that may be rendered" in this action. *Albertson v. Raboff*, 46 Cal. 2d 375, 379 (1956); Cal. Civ. Proc. Code § 1908(a)(2); *see Duncan v. Farm Credit Bank of St. Louis*, 940 F.2d 1099, 1101 (7th Cir. 1991) (state *lis pendens* rules govern federal court proceedings).

Having chosen to proceed at its own risk to begin work upon the property in the absence of a final judicial determination regarding the legality of the transaction, and in the face of Respondent's declared intention to challenge the sale, the Association remarkably declares that those very improvements upon the property – evidence of which has twice been barred from the appellate record – should now immunize the transaction from judicial review. As such, the argument is the constitutional equivalent of adverse possession: regardless of whether its claim to the land was legal in the first instance, the Association is there now and asserts an expressive right to stay put.

The claim is baseless. The Association's speech and free exercise interests arising from its current occupancy of the cross property are contingent upon, not independent of, the legality of its ownership. Unless and until it is determined that the City acted constitutionally in transferring the property to the Association, and thus that the Association's title is cleared of its present and obvious cloud, none of the Association's asserted interests in the

property – not merely those arising from the federal Constitution – can be recognized, let alone enforced.[17]

CONCLUSION

For the reasons set forth above, Plaintiff/Respondent Philip Paulson respectfully requests that the Petitions for a Writ of Certiorari filed in this matter by Defendant/Petitioner City of San Diego and Defendant/Petitioner Mt. Soledad Memorial Association be denied.

Respectfully submitted,

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[17] As to the plaque-holders, their remedy lies against Petitioners themselves. Having chosen to proceed with construction and irresponsibly represented to hundreds of plaque-purchasers that the property was ready for development, presumably without disclosing the pendency of this litigation and the risks and uncertainty attending that fact, Petitioners must answer for their improvident conduct.

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October 21, 1998

CASEY G. GWINN, ESQ.
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Re: PHILIP K. PAULSON et al. v. CITY OF SAN DIEGO
Case No. Civ. No. 89-820-GT

Dear Mr. Gwinn:

Thank you for discussing this matter with me. This will confirm that I advised you of the likelihood that plaintiffs will object to the recent sale and transfer of land and that I anticipate filing a motion in that regard in the near future. This will also confirm that I suggested the City and the prospective buyer not take any further action or incur any further expenses in this matter until this motion is heard by the court. You advised me that the City and the buyer would probably decide to proceed with the transaction despite the knowledge that I will be filing opposition to the transaction on behalf of my clients.

Since we last spoke, the court issued its decision in the Mt. Helix case which I believes lends support to our position.

As soon as we are able to complete some additional discovery, we will be filing our opposition. If you have any

concerns or suggestions regarding the timing of the discovery and the filing of our opposition, please don't hesitate to contact me. I will be happy to cooperate with you in that regard.

Sincerely,

JAMES E. McELROY

JEM:jm

cc: Philip K. Paulson
Peter Irons

No. 02-1093

Supreme Court, U.S.
FILED
MAR 21 2003
CLERK

IN THE
Supreme Court of the United States

CITY OF SAN DIEGO;
MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,
Petitioners,

v.

PHILIP K. PAULSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. CERTIORARI JURISDICTION IS ENTIRELY PROPER AND WARRANTED IN THIS CASE

Review of this case is warranted because the Ninth Circuit's en banc ruling raises significant federal questions that need to be addressed by this Court. These important federal questions fall squarely within this Court's discretion to review matters under Rule 10. First and foremost, the Ninth Circuit's failure to properly interpret state law violates a fundamental federal principle, the *Erie* doctrine. *See* Para. I.A, *infra*.

The Ninth Circuit's interpretation of state law is flawed because a fair market value sale to the highest bidder simply does not constitute aid under the No Aid Clause. *See* Para. II, *infra*. This is especially true where the highest bidder is the Mt. Soledad Memorial Association (Association), a secular organization whose purpose and mission has nothing to do with religion or religious purposes. In reaching such a far-fetched conclusion–finding aid to religious purposes where there is none- the Ninth Circuit has repeatedly demonstrated its hostility to religion and religious viewpoints.[1]

Moreover, the Ninth Circuit's broad interpretation of the state No Aid Clause violates rights guaranteed under the federal Constitution by requiring that the City discriminate on the basis of religious viewpoint.

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[1]In perhaps one of the most controversial cases in recent history, the Ninth Circuit held the phrase "under God" in the National Pledge of Allegiance unconstitutional. *Newdow v. U.S. Congress (Newdow I)*, 292 F.3d 597 (9th Cir. 2002). Most recently, despite a vehement dissent from several judges, a majority of the Ninth Circuit adamantly refused to grant en banc review of this decision. *Newdow v. U.S. Congress (Newdow II)*, 3 Cal.Daily.Op.Serv. 1724 (9th Cir. 2003).

A. The Ninth Circuit Violated The *Erie* Doctrine

By failing to properly interpret state law, the Ninth Circuit contravened a fundamental principle of federal law, the *Erie* doctrine, which provides the foundation for relations between federal and state courts. *Erie* requires that federal courts deciding state law questions are to apply the law of the state as set forth in state statutes, regulations, judicial precedents, and other sources of law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Most basically, a federal court deciding a state law question is to decide the issue the way the state Supreme Court would.

It is difficult to fathom how the Ninth Circuit could adhere to this fundamental principle when it deliberately omits any substantive analysis of *East Bay Asian Local Dev. Corp. v. State of California*, 24 Cal.4th 693 (2000), the most recent pronouncement of the California Supreme Court on the No Aid Clause. The Ninth Circuit is simply not at liberty to pick and choose which state law precedents it wishes to apply and cavalierly interpret them to support a predetermined outcome.

1. *East Bay Asian* Establishes That There Cannot Be A No Aid Clause Violation In This Case

East Bay Asian stands for the proposition that governmental action to simply step out of the way of religion does not constitute a violation of the No Aid Clause.[2] *East Bay Asian*, 24 Cal. 4th at 717. As they must,

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[2] The California Supreme Court's holding represents a marked shift from prior applications of the No Aid Clause by recognizing that substantial benefits can accrue to religion and religious groups so long as government seeks to avoid federal constitutional violations such as

Respondent concurs with this reading of the case. (Resp., p. 15).

Nevertheless, Respondent disingenuously attempts to distinguish *East Bay Asian* by arguing that "the entire point of the transaction in the case at bar was to *transform* the status of the property from a government-endorsed religious display to a privately-held memorial." *Id.* It is contradictory and self-serving for Respondent to argue that such a transformation results in the inapplicability of *East Bay Asian* when such a consequence has been forced upon the City through his relentless litigation. The transparency of Respondent's argument reveals that his one and only aim is and has always been to see that the cross is permanently removed or destroyed. Unless his desired outcome is achieved, Respondent has demonstrated through protracted litigation in this case that he will never be satisfied.

More importantly, Respondent's argument misses the point and fails to distinguish the facts of the instant case from *East Bay Asian*. The aim of the transaction was to transform the property from government to private ownership. However, this does not negate the fact that the City's purpose was to step out of the way of religion. In fact, the City remained scrupulously neutral towards religion by explicitly permitting the successful bidder full discretion to maintain or remove the cross. This fact is further illustrated by a comparison of the sale of public land surrounding a cross in the instant case to the one in San Francisco.[3]

Although Respondent touts the City of San Francisco's sale of the land and cross atop Mt. Davidson as

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burdening *potential* free exercise rights. *East Bay Asian*, 24 Cal.4th at 710.

[3] This case is *Kong v. City and County of San Francisco*, 18 Fed.Appx. 616 (9th Cir. 2001).

constitutionally permissible under the No Aid Clause, that sale offered bidders wishing to maintain the cross a significant advantage over bidders wishing to remove it. (Respondent, p. 16, fn. 9). Because of the open space restriction that San Francisco placed on the property,[4] a successful bidder could only maintain either a cross or open space on the auctioned property. Rather than remain scrupulously neutral towards religion, the Mt. Davidson sale entirely prohibited those wishing to espouse viewpoints other than those represented by the cross. As a result, a prospective bidder wishing to remove the cross would find little value in bidding on land that he or she could only maintain as open space. On the other hand, the City's sale here permitted the successful bidder discretion to erect either a religious or secular war memorial. In this way, the City's sale was inclusive of views of both religious and non-religious bidders, affording everyone an equal opportunity to bid on the auctioned property.[5]

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[4] Respondent erroneously characterizes the San Francisco case as imposing no use restriction upon the auctioned property. (Resp., p.16, fn.9). Actually, however, San Francisco imposed an open space restriction, which only permitted a successful bidder to maintain the cross or open space on the property. (Ass'n ER 34). The San Francisco Invitation to Bid specifically states: "Property may be used only for open space in its natural, scenic condition. . . No *new* buildings or other structures may be constructed on the Property." (Emphasis added). *Id.*

[5] Moreover, despite Respondent's affirmation of the Mt. Davidson sale, under the Ninth Circuit's strained interpretation of the No Aid Clause, the conveyance of the cross in that case would still render it constitutionally infirm. The successful bidder wishing to remove the cross would still have to bear the cost of removal. Therefore, Respondent's suggestion that the City should offer to deliver the property with or without the cross at the buyer's direction does not alleviate the constitutional infirmity under the Ninth Circuit's analysis. (Resp., p. 25). Likewise, Respondent's suggestion that the City could offer the winning bidder a set amount of financial assistance to either construct a new memorial or improve the existing one is without merit. *Id.* As evidenced by Respondent's approval of the Mt. Davidson sale, there is no

2. The Ninth Circuit's Unprecedented Expansion Of The No Aid Clause Is A Violation Of The *Erie* Doctrine

The Ninth Circuit's unilateral decision to elevate the state No Aid Clause as the singular centerpiece of this litigation and to improperly expand its scope constitutes an *Erie* violation. Heretofore, no other court, state or federal, has ever applied the No Aid Clause in the manner that the Ninth Circuit did.[6] Respondent does not refute the veracity of this statement. (Resp., p. 11). Its significance lies in the fact that the interpretation of and significance accorded to state law is to be dictated by state courts, not federal courts. According to the *Erie* doctrine as pronounced by the United States Supreme Court, the role of federal courts is simply to faithfully apply state law as determined by state precedent and as the state Supreme Court would.

Despite now emphasizing the significance of the No Aid Clause (Resp., p. 12), Respondent omitted any reference to it whatsoever in his petition for en banc rehearing. Consequently, the City's answer to the petition did not rebut any arguments regarding the No Aid Clause because none were raised. The tangential significance of the No Aid Clause in this litigation is evidenced by the fact that the en banc panel of the Ninth Circuit requested supplemental briefing on issues other than the No Aid Clause. Likewise, no questions were raised concerning the No Aid Clause

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requirement, constitutional or otherwise, that the City be required to offer financial assistance to prospective purchasers to fund an entirely private enterprise. In fact, to do so, would create federal Establishment Clause issues by virtue of the City's entanglement.

[6] The en banc majority of the Ninth Circuit admits as much by stating that "[n]either the California Supreme Court nor any California Court of Appeal has considered the application of article XVI, section 5, to facts resembling those presented in this case. . ." App. 11a.

during oral argument. Only after the en banc majority rendered its baseless decision hostile to the Free Exercise Clause and the *Erie* doctrine did the No Aid Clause become singularly significant.

II. THE CITY'S FAIR MARKET VALUE SALE TO THE HIGHEST BIDDER DOES NOT VIOLATE THE NO AID CLAUSE

Respondent admits, as he must, that a fair market value transaction to the highest bidder does not run afoul of the No Aid Clause. (Resp., p. 16). Nevertheless, Respondent summarily dismisses this "uncontested principle." *Id.* In doing so, Respondent, like the Ninth Circuit, ignores the plain facts of this case.

A. The Property Was Made Equally Available To All Potential Bidders

Although Respondent claims that the property was not made equally available to all potential bidders, the open bid process that the City employed belies that contention. Forty-two interested parties requested bid packets and five groups submitted actual bids. Of these five groups, two were from religious organizations, two were from atheist organizations, and the other was from the Association, a secular veteran's group. The land was sold as-is and the City's bid invitation repeatedly stated that the successful bidder had the discretion to retain or remove the cross. At the conclusion of the process, the sale was awarded to the highest bidder who paid fair market value for the entire auctioned parcel which included the cross.[7]

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[7] None of the bidders, only Respondent who never participated, complained about bias in the process. Even then, Respondent did not do so until the sale was completed and the outcome contrary to his liking.

B. The Ninth Circuit's Strict Economic Analysis Is Entirely Misguided

The sole basis for the Ninth Circuit's contention that the bid process conferred a benefit for religious purposes involves a strict one-sided economic analysis that the bidder wishing to remove the cross would have to incur the cost of removal and erection of an alternative memorial. However, the Ninth Circuit failed to consider the fact that the cost of maintaining an almost 50-year old, 43-foot tall, 24-ton cross could very possibly exceed the cost of demolishing it and maintaining a very modest war memorial such as a bronze plaque or rose garden. In such a case, there would be absolutely no financial benefit in maintaining the cross (but rather a financial detriment) and as such, there could not conceivably be a No Aid Clause violation. Respondent altogether fails to address this glaring weakness in the Ninth Circuit's misguided economic analysis.

Moreover, the Ninth Circuit falsely assumed that a bidder wishing to remove the cross would be required to set aside a certain amount in reserves to fund dismantling of the cross. In reality, the bids were evaluated on the basis not only of current reserves, but also the demonstrated ability to fund-raise. (Ass'n ER, pp. 111-120). Rather than employ a static economic analysis of the sale, the Ninth Circuit should have properly considered a dynamic approach--one in line with reality and the facts of this case. That is, any bidder, regardless of their desire to maintain or remove the cross, was able to equally bid to the full extent of their reserves so long as they could demonstrate the ability to raise funds.[8]

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[8] Because no time frame was ever imposed by the City regarding exactly when the war memorial needed to be erected, any successful bidder could raise funds to do so in due course.

C. The Cross Is And Always Has Been Owned By The Association

The cross was erected and owned by the Association since 1954. App. 92a, 98a. Although the cross was to be conveyed with the sale of the land, the Association was conferred no governmental benefit by its inclusion in the sale because the Association had paid for the erection of the cross in the first instance, continued to own it throughout. App. 92a, 98a. Because the Association was the highest bidder, it never executed the quitclaim deed which would have conveyed its interest in the cross.

Through a misunderstanding of the law regarding fixtures, Respondent contests the fact that the cross has been owned by the Association. (Resp., p.19, fn.11). The plain language of Civil Code section 1013 cited by Respondent, however, clearly allows individuals to remove their fixtures from another's property. Moreover, other sections in the same chapter allow fixtures to be removed and kept by the person affixing them. *See* Cal. Civil Code §§1013.5 and 1019.

D. The Cross Is Not Inextricably Intertwined With Any Religious Message

In the context of a veteran's memorial maintained and owned by a secular veteran's group, the cross does not symbolize Christian values. Here, the lack of Christian sentiment expressed by the cross is especially true because each plaque dedicated to the memory of our nation's war heroes contains a separate symbol of faith (or lack thereof, i.e. atheist symbol) chosen by the plaque donors.

Respondent characterizes case law precedent regarding the Latin cross as the principal symbol of Christianity as "the law of the case." (Resp., p. 17). However, the law of the case doctrine is not a bar to this

Court's jurisdiction to review this flawed premise. *Pennsylvania v. Ritchie*, 480 U.S. 39, 48, fn.7 (1987). An objective reasonable observer viewing this particular setting would understand that the cross simply represents peace, solemnity, and the passage of life. In this way, there is no violation of the No Aid Clause because no religious purpose is involved in any transaction involving the cross.

E. The Association Is A Secular Organization Whose Purpose Does Not Involve Religion

For there to be a violation of the No Aid Clause, any governmental aid must be properly characterized as having a "direct, immediate, and substantial effect of promoting religious purposes." *Calif. Educ. Facilities Authority v. Priest*, 12 Cal.3d 593, 605, fn. 12. By its plain language, the No Aid Clause only applies to sectarian religious purposes. To the extent that the Association is involved in any matter that can even be considered sectarian or religious, such activity is clearly incidental to their primary role as a secular veteran's organization. Therefore, any governmental aid in furtherance of religion would likewise be incidental. Consequently, no impermissible aid to religion exists.

III. THE STATE CONSTITUTION CANNOT EVISCERATE PROTECTIONS UNDER THE FEDERAL CONSTITUTION

Rather than substantively analyze the violations of the Association's federal constitutional rights under the First and Fourteenth Amendments engendered by the en banc majority's strained analysis in this case, Respondent offers off-handed, quick fix "solutions".

As set forth earlier, Respondent's "solutions" and their failure to remedy the alleged constitutional infirmity simply underscore the problematic basis of the Ninth

Circuit's ruling. *See* p.5, fn 5, *supra*. Proper consideration of the practical consequences of the ruling as previously discussed at length in the City's Writ Petition reveals that the Ninth Circuit's unprecedented expansion of state constitutional rights under the No Aid Clause violates the First and Fourteenth Amendments of the U.S. Constitution.

Furthermore, Respondent erroneously disavows any parallels between the state No Aid Clause and the federal Establishment Clause indicating that the two are part of one test despite a California Supreme Court case, two attorney general opinions, and two United States Supreme Court decisions to the contrary. (Resp., pp. 12-13; City, p.11). Although Respondent summarily dismisses the attorney general opinions, he altogether fails to address the California and United States Supreme Court opinions.

In the final analysis, the federal Establishment Clause itself represents a delicate balance demanding government impartiality in the field of religion. In particular, government may neither advance *nor inhibit religion*. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (Emphasis added). To weigh too heavily on one side, as the Ninth Circuit as done here with its expansive reading of the No Aid Clause, is to unconstitutionally tip the balance.

CONCLUSION

THEREFORE, Petitioner CITY OF SAN DIEGO requests that this Court GRANT Certiorari in this case.

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